

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

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4 In re:

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6 LEHMAN BROTHERS HOLDINGS

7 INC.,

8 Case No. 08-13555(SCC)

9 Debtor.

10 - - - - - x

11 LEHMAN BROTHERS INC. Adv. Case No. 08-01420(SCC)

12 - - - - - x

13 LEHMAN BROTHERS HOLDINGS

14 INC., ET AL.,

15 Plaintiffs,

16 v. Adv. Case No. 15-01112(SCC)

17 U.S. BANK NATIONAL

18 ASSOCIATION, ET AL.,

19 Defendants.

20 - - - - - x

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1 LEHMAN BROTHERS HOLDINGS

2 INC., IN ITS CAPACITY AS,

3 Plaintiff,

4 v. Adv. Case No. 14-02409(SCC)

5 UUTAH HOUSING CORPORATION

6 (F/K/A UTAH HOUSING

7 FINANCE),

8 Defendant.

9 - - - - - x

10 MOORE MACRO FUND, LP, ET AL.,

11 Plaintiffs,

12 v. Adv. Case No. 14-02021(SCC)

13 LEHMAN BROTHERS HOLDINGS

14 INC., ET AL.,

15 Defendants.

16 - - - - - x

17

18 U.S. Bankruptcy Court

19 One Bowling Green

20 New York, New York

21

22 July 22, 2015

23 10:03 AM

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1 B E F O R E :

2 HON SHELLEY C. CHAPMAN

3 U.S. BANKRUPTCY JUDGE

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8 Hearing re: 08-13555 - Doc #47569 Status Conference

9 Regarding Order Establishing a Protocol to resolve Claims

10 Filed by Trustees on Behalf of Certain Issuers of

11 Residential Mortgage-Backed Securities

12

13 Hearing re: Doc #49382 Four Hundred Ninety-Ninth Omnibus

14 Objection to Claims (No Liability Claims)(Claims 20328 &

15 21368)

16

17 Hearing re: Adv. 08-01420 - Doc #12409 Eighteenth

18 Application of Hughes Hubbard & Reed LLP for Allowance of

19 Interim Compensation for Services Rendered and Reimbursement

20 of Actual and Necessary Expenses Incurred from January 1,

21 2015 through April 30, 2015

22

23 Hearing re: Adv. 08-01420 - Doc #12408 Joint Notice of

24 Presentment of Eighth Amended Order Establishing Procedures

25 Governing Interim Monthly Compensation of Trustee and Hughes

Hubbard & Reed LLP

Hearing re: Adv. 08-01420 - Doc #12143 Trustee's
Supplemental Objection to the Amended and Supplemental
Pleading to Proofs of Claim Subject to the Two Hundred
Seventy Omnibus Objection (No Liability Claims)

Hearing re: Adv. 15-01112 - Pre-trial Conference

Hearing re: Adv. 14-02409 - Doc #15 Motion to Dismiss
Adversary Proceeding

Hearing re: Adv. 14-02021 - Doc #52 Motion to Compel
Document Discovery filed by Bennette D. Kramer on behalf of
JR Moore, LP, et al.

Hearing re: Adv. 14-02021 - Doc #66 Motion to Compel
Production of Documents and for Future Relief filed by
Stephen Patrick Farrelly on behalf of Lehman Brothers
Commercial Corporation, et al.

Transcribed by: Dawn South, Tracey Williams, Lisa Beck, and
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1 P R O C E E D I N G S

2 THE COURT: How is everyone today? Ready when you
3 are.

4 MR. KOBAK: Good morning, Your Honor.

5 THE COURT: Good morning.

6 MR. KOBAK: James Kobak, Hughes Hubbard & Reed,
7 for Mr. Giddens, the SIPA Trustee.

8 By agreement with Holdings we have two
9 uncontested --

10 THE COURT: Yes.

11 MR. KOBAK: -- fee matters, so we agreed to put
12 those on first.

13 THE COURT: Right.

14 MR. KOBAK: The first is my firm's eighteenth
15 interim fee application, which covers the four-month period,
16 January of this year through April 30th, reflects a total
17 amount of hours of over 20,000 hours, including
18 approximately 250 hours by the trustee. We also request
19 reimbursement of expenses in the amount of \$142,543.85.

20 There's no opposition to this motion, and it's
21 supported by SIPC. And as Your Honor knows, Mr. Caputo is
22 here today, and of course SIPC's recommendation is entitled
23 to considerable reliance.

24 As usual our application reflects our customary
25 ten percent public interest discount.

1 In addition to that, based on our own review and
2 on SIPC's review, there were further reductions, which are
3 detailed in the application of both fees and expenses, which
4 total over \$400,000.

5 This was a very active period. There was
6 considerable progress made on the claims side by Ms. Grag
7 (ph) and her team, and in addition we completed or undertook
8 the second interim distribution, which Your Honor recognized
9 was very unanticipated when this case started, and as Your
10 Honor knows, we're about to embark on a third one, which is
11 even more unanticipated.

12 So, I think all the documentation and so forth is
13 in the motion and my affidavit, and as I say, the motion is
14 unopposed. And unless Your Honor has any questions we'd ask
15 you to enter an order approving the application.

16 THE COURT: All right. Thank you.

17 Does anyone wish to be heard with respect to the
18 application of allowance for compensation?

19 All right. I agree with your characterization on
20 the progress that has been, and of course recognize the
21 deference that's to be afforded to SIPC, and I'm happy to
22 enter the proposed order.

23 MR. KOBAK: Thank you, Your Honor.

24 THE COURT: Thank you.

25 MR. KOBAK: And the second matter is -- it's

1 actually here on presentment, and again it's unopposed.
2 It's a joint motion by SIPC and the trustee to amend the
3 seventh interim compensation order to make it the eighth
4 interim compensation order.

5 And essentially what this asks for is a release of
6 held-back fees for the period from September 2014 through
7 April 15. There still will be a remaining holdback of
8 \$1 million.

9 THE COURT: All right. Does anyone wish to be
10 heard with respect to the second application?

11 All right. It too will be granted. Thank you
12 very much.

13 MR. KOBAK: Thank you very much, Your Honor.

14 THE COURT: It's nice to see you.

15 All right. We're going to move onto the LBHI
16 agenda, please.

17 The first matter is the status conference
18 regarding the protocol to resolve claims filed by the RMBS
19 trustees.

20 (Pause)

21 THE COURT: Hello everyone, how are you? You've
22 been very busy.

23 UNIDENTIFIED SPEAKER: Indeed.

24 THE COURT: Very busy. I'm very happy to read
25 about it. Who would like to make comments first?

1 MR. COSENZA: Good morning, Your Honor, Todd
2 Consenza. I think (indiscernible) status reports admission.
3 I think we'll have the trustees sort of start and then I'll
4 have some follow-up points.

5 THE COURT: Excellent. All right. Thank you.

6 MR. TOP: Good morning, Your Honor.

7 THE COURT: Good morning.

8 MR. TOP: My name is Frank Top, from Chapman and
9 Cutler on behalf of U.S. Bank National Association, as
10 Trustee. With me today is Rick Pedone, representing
11 Deutsche Bank, he's from Nixon & Peabody. We have Bill
12 Munno and Dan Guzman from Seward & Kissel on behalf of Law
13 Debenture, and then Kit Whitenauer (ph) and Jason Solomon,
14 here on behalf of the Wilmington Trust entities.

15 THE COURT: Okay.

16 MR. TOP: We did file on Friday afternoon a status
17 report to give you, you know, how we've complied with the
18 various aspects of the protocol. I think we're doing
19 actually a better job than I've expected, thanks to a lot of
20 the efforts of Mr. Munno getting loan files. I mean --

21 THE COURT: You're doing a better job than you had
22 expect -- that you all had expected.

23 MR. TOP: I think that's true.

24 THE COURT: And I think -- and was very pleased to
25 see that.

1 MR. TOP: Right.

2 THE COURT: And I appreciate it and it's obviously
3 been a lot of work that's been pursued with a lot of
4 diligence.

5 MR. TOP: Yeah. And that's not to suggest that we
6 don't have some problems that remain outstanding, obviously
7 we're still trying to get about 38,000 loans. In London
8 since we've had to issue a subpoena for a relatively small
9 number of loans, in other cases there have been some
10 servicers that can't really match up their identification
11 numbers with what we presented them, so we're giving them
12 additional information which to help them find some loan
13 files, and then, you know, obviously there's the issue with
14 that one and, you know, we've agreed on a timeline within
15 which they're going to produce 11,000 of their loan files
16 within the next two months. And then there's the GMAC
17 loans, which right now are kind of the wild card, but you
18 know, a decision by Judge Glenn recently has required ResCap
19 to produce those loan files to Oqwin (ph). And so hopefully
20 that will be the end of that matter.

21 THE COURT: Okay.

22 MR. TOP: So that part of it's going pretty well.

23 We've obviously met our March deadline of 10,000
24 loans that we either submitted claims for or decided not to
25 submit claims for, and met our deadline of June 30th to

1 submit over 50,000 claims. Again, not all -- to review
2 50,000 loans rights --

3 THE COURT: Right.

4 MR. TOP: -- half of which we've submitted claims
5 for, the other half of which we decided, you know, it was
6 either not something that we thought was a big deal, or in
7 other cases there just wasn't a claim to make at all, so.

8 THE COURT: Right. The loans were -- and I think
9 you said in --

10 MR. TOP: That's right.

11 THE COURT: -- about approximately 7,000 instances
12 the loans had been fully paid.

13 MR. TOP: That's right.

14 So -- and then the another thing I just I suppose
15 I wanted to mention and then I'll open it up for any
16 questions you might have about the process, is you know,
17 again, we had the file proceedings in Minnesota, it's more
18 trust administrative type of a deal in that some of these
19 trusts had limitations on what we could spend, and there was
20 a concern that if we didn't seek permission from, you know,
21 a court that had jurisdiction over these trusts to increase
22 -- to allow us to do this outside of the cap that, you know,
23 we would not be able to -- someone might come back and
24 challenge it later or something like that. So we went to
25 the court in Minnesota to do that.

1 If Your Honor is interested in any of those papers
2 happy to give you a copy of them, happy not to give you a
3 copy of them, but --

4 THE COURT: Unless I need to see them I have
5 plenty of paper --

6 MR. TOP: Yeah. So any way --

7 THE COURT: -- in this case and others to look at.

8 MR. TOP: To that end we've been very proactive.

9 THE COURT: You have to do what you have to --
10 what you have to do, so.

11 MR. TOP: Yeah, exactly. Exactly. So if you have
12 any questions happy to answer them, if not I'm happy to sit
13 down.

14 THE COURT: All right. Why don't you take a seat.
15 Thank you.

16 MR. COSENZA: Hey, Your Honor.

17 THE COURT: Good morning, Mr. Cosenza, how are
18 you?

19 MR. COSENZA: Good morning. Your Honor, I'm going
20 to start with the Minnesota proceed at this point.

21 Part of this process that's been set up is for
22 there to be open disclosure, open exchange of information --

23 THE COURT: Right.

24 MR. COSENZA: -- the protocol has many steps as
25 part of the process. The next few steps in the protocol

1 after their review of the first 50,000 files is frankly
2 going to be a very close review of the claims they put
3 forward. I think the trustee has not surprisingly put
4 forward a wide number of claims. They had a really broad
5 definition of what a breach is, any claim with, you know, a
6 certain very low threshold that's been a loss they put
7 forward to us. So there's going to be a very, very
8 significant number of files that are going have to go
9 through our review -- the next step of the protocol --

10 THE COURT: Right.

11 MR. COSENZA: -- which will be sort of a meet and
12 confer session, and then through the claims facilitation
13 process, and hopefully that will eliminate most of the
14 claims before having to come to you.

15 THE COURT: So before you get to that point though
16 what Mr. Top indicated, and I didn't get a sense of the
17 numbers, was that a number of claims didn't make -- a number
18 of files didn't make it out of the starting box and become
19 claims. In other words they had concluded that there wasn't
20 a claim either because it was paid -- the loan was paid in
21 full or some other reason. And I didn't ask Mr. Top, I'll
22 ask you. Is there any sense of the order of magnitude of
23 that in terms of absolute numbers or a percentage?

24 MR. COSENZA: I think they would have the
25 percentage. I've been told that they've been putting

1 forward basically claims that -- with a very -- with any
2 losses a very low threshold, and they've also put forward to
3 us claims on loans that actually have been performing. So
4 there's a large number of files that are, you know --

5 THE COURT: I see.

6 MR. COSENZA: -- coming down on our end.

7 So there are a number of files that they've put to
8 the side where they think they -- that are performing loans
9 that they're basically able to -- you know, there's no need
10 for them because they're actually being --

11 THE COURT: Right. I guess in a simplistic way --

12 MR. COSENZA: -- those loans have been very
13 profitable.

14 THE COURT: -- I'm just -- I'm looking to have a
15 total number and to definitively know that that number has
16 been reduced by --

17 MR. COSENZA: X percent.

18 THE COURT: -- X. But in the status report it
19 indicates that with respect to 7,000 --

20 MR. COSENZA: Yes.

21 THE COURT: -- files they're fully paid.

22 So someone is rising behind you, perhaps they have
23 something of an answer of that question.

24 MR. ROLLIN: Michael Rollin from Jones & Keller.

25 Your Honor, as we understand it the -- what

1 they're -- the loans that they review but don't submit to us
2 as claim breaches are loans in which they just don't find
3 breach at all or there's a dollar threshold but they're not
4 even reviewing beyond what the dollar threshold is.

5 THE COURT: Right. And they don't find the breach
6 either because --

7 MR. ROLLIN: Everything else --

8 THE COURT: -- it's been paid or they otherwise
9 don't find the breach.

10 MR. ROLLIN: Or they otherwise don't find a
11 breach. Otherwise they're throwing a fairly large number of
12 claims, and subject to our review, many of which we disagree
13 with.

14 THE COURT: Sure. No, I understand that, that
15 we're only at the very beginning. I'm just again
16 simplistically trying to take the 210,000 file number that
17 we start at and say completely off the table are 20,000 or
18 30,000 files.

19 MR. TOP: Yeah, so and just a little tweak to what
20 Mr. Rollin said is, it's not just loans that have no
21 breaches at all that we're getting rid of, I mean there
22 might be what we deem not to be an insignificant breach that
23 we're also not passing along. So just because a loan file
24 has a breach if we don't believe it's, you know --

25 THE COURT: Meets the standard.

1 MR. TOP: -- raises to a certain level, we're not
2 passing those things off.

3 THE COURT: Okay. It is what it is. You know, if
4 there's no answer that's fine, it's just my curiosity.

5 MR. TOP: So in terms of numbers though we've
6 reviewed a little bit more than 50,000 loans, and it's about
7 50/50. We're not submitting things on half, and we're
8 submitting claims on the other half.

9 THE COURT: That's the number that I'm looking
10 for, right? So whether that's predictive -- you know,
11 again, not to go back to our old friend the sampling topic
12 -- whether that hit rate, so to speak, is predictive of
13 what's to come, I have no way of knowing, you probably have
14 no way of knowing, but right now facts on the ground if only
15 50 percent of the reviewed files have made it over, that's a
16 number that's interesting. That was the number that I was
17 looking for.

18 MR. ROLLIN: So that Your Honor has some clarity
19 and context around that number, that's still 50 percent
20 though may be still a very substantial number of
21 insignificant claims.

22 THE COURT: I hear you, but to the extent that
23 there are claims that didn't make it over, that's -- those
24 are claims that don't have to be considered by the trustee
25 or me. So we'll call it progress.

1 MR. COSENZA: Yes. So, I guess that's leading
2 until I think the next status conference --

3 THE COURT: Next steps, right.

4 MR. COSENZA: -- we'll have a better step to sort
5 of work through and get you a better sense as to what we're
6 looking at on our end in terms of our review.

7 THE COURT: And the trustee -- and I'm sorry, the
8 estate is prepared to proceed consistent with the protocol
9 and do what it's now required to do --

10 MR. COSENZA: Correct.

11 THE COURT: -- having received --

12 MR. COSENZA: Correct.

13 THE COURT: -- the files.

14 MR. COSENZA: I think the next deadline for us is
15 August 31 to start, you know, responding back to these
16 claims that have been put forward.

17 THE COURT: Okay.

18 MR. COSENZA: But, Your Honor, still I wanted to
19 go back to --

20 THE COURT: To Minnesota?

21 MR. COSENZA: -- to the Minnesota proceedings.

22 We've had a series of weekly calls with the
23 trustees and their counsel, we had a long lengthy meet and
24 confer with them last week to go through how the protocol is
25 working. The Minnesota proceeding was, you know, not

1 mentioned to at least, you know, counsel. We weren't made
2 aware of what happened in Minnesota. You know, this really
3 impacts the certificate holders here, they potentially could
4 receive a payout from the trust. So we actually want some
5 insight into what happened in Minnesota.

6 THE COURT: So can you explain that to me?
7 Because the way I was looking at it was that it was just
8 simply something administrative that the trustees needed to
9 do, but that wouldn't necessarily impact anything. So could
10 you explain that a little more?

11 MR. COSENZA: Sure. I don't have full insight
12 into Minnesota --

13 THE COURT: Right.

14 MR. COSENZA: -- but my understanding is this
15 happens that the trusts and the trustees have expense
16 caps --

17 THE COURT: Right.

18 MR. COSENZA: -- and they were trying to lift
19 those caps to comply with the protocol.

20 THE COURT: Right.

21 MR. COSENZA: And obviously --

22 THE COURT: Well they have to comply with the
23 protocol.

24 MR. COSENZA: Correct.

25 THE COURT: The question as far as I can tell is

1 how they're going to get paid for doing that. But there's
2 nothing in the protocol --

3 MR. COSENZA: Correct.

4 THE COURT: -- that says that they only have to
5 comply up to \$200,000. One of the issues that was raised at
6 the stage at which we implemented the protocol was the
7 expense.

8 MR. COSENZA: Uh-huh.

9 THE COURT: So --

10 MR. COSENZA: So, I guess I don't know what's
11 happened in Minnesota or how it impacts certificate holders,
12 how it impacts the protocol, but I would have expected to at
13 least been, you know, for us and the Court to be sort of
14 kept abreast as to what was going on in Minnesota to see how
15 it impacts the protocol, how it actually impacts the
16 ultimate recovery to the certificate holders.

17 I've made a request for the trustees' counsel and
18 they're going to provide me with data and some of the
19 pleadings from the Minnesota case, I just don't want to put
20 an end in that issue so we can sort of from our perspective
21 understand that and figure out what happened to see if
22 there's any issue that needs to be raised to you, if any. I
23 just don't have any insight as to what happened in
24 Minnesota.

25 I would have expected that there would have been

1 some more dialogue and, you know, at least brought us a
2 little more notice and transparency as to what happened in
3 Minnesota, because the protocol is predicated on us working
4 together and sort of figuring out these issues. We may not
5 have any issue with Minnesota, but I just need to know, we
6 just need to sort of be in a position to understand what
7 happened.

8 THE COURT: Okay. All right. So do you folks
9 have any issue with that?

10 MR. TOP: Your Honor --

11 THE COURT: I mean I don't think --

12 MR. TOP: Well first of all we don't necessarily
13 believe that what happened in Minnesota has anything to do
14 with the estate, but we're more than happy to give him
15 copies of whatever he wants as it relates to those
16 proceedings.

17 Those proceedings were -- first of all we believe
18 that some people at the estate knew about that we were in
19 fact doing this, so I don't -- I take a little bit of -- I
20 differ a little bit from Mr. Cosenza in that I do think that
21 people on the estate side knew that we were filing these
22 Minnesota proceedings. Whether they knew it or not really
23 doesn't matter. We're more than happy to give them --

24 THE COURT: Okay.

25 MR. TOP: -- all of those materials and he can

1 take a look at it and do whatever he would like with those
2 things.

3 Again, but it's -- you know, we needed to get
4 relief from the cap so that we could actually pay these loan
5 review firms, you know, for their work and reviewing these
6 loans, and so that was the sole purpose of going up there.

7 THE COURT: Okay. I guess the easiest -- the most
8 cooperative thing to do, which is in keeping with the spirit
9 of the protocol, is total transparency, and to the extent
10 that there's any hint of an issue you can talk it out.

11 I certainly don't want to be in the position of
12 having something happen in Minnesota that could be viewed as
13 being a cross-purposes with what we're doing here. I would
14 -- you know, I -- judges around the country may not agree on
15 the merits or the approach on all of these cases, but to the
16 extend that you -- that court has jurisdiction over you and
17 I have jurisdiction over this I'd certainly want to be
18 coordinated, if you will, and not have either of us be
19 surprised by what the other one is doing, and I think the
20 best way to do that is not for me to be kept in the loop,
21 but for the estate to be kept in the estate, and then you
22 can let me know if there's any issue, which I totally don't
23 see at all.

24 MR. TOP: No. We -- substantive items were not
25 addressed as the relate to these particular claims, so

1 obviously --

2 THE COURT: Right.

3 MR. TOP: -- in order to get relief from a court
4 you have to say why you need to get relief, right?

5 THE COURT: Understood.

6 MR. TOP: So we have to tell the court, you know,
7 obviously we expect (indiscernible) amount of money, and
8 from our perspective we're expecting to get recoveries that
9 are worth a certain amount. They may agree with them, they
10 may not agree with them, but nonetheless we have to make our
11 case --

12 THE COURT: Sure.

13 MR. TOP: -- before that Minnesota court.

14 THE COURT: I understand.

15 MR. TOP: So -- but again, it's not like the court
16 in Minnesota said, oh, yes, you guys are going to get this
17 amount of money in terms of claims and recoveries. No, that
18 didn't happen. It's just merely to remove that --

19 THE COURT: Or why is that crazy judge in New York
20 making you review 200,000 files?

21 (Laughter)

22 MR. TOP: They did not say that.

23 MR. COSENZA: Your Honor, just one final -- last
24 point on this.

25 They brought the claims against the Lehman estate

1 in this court, I mean the Bankruptcy Court has exclusive
2 jurisdiction.

3 THE COURT: I do. No, I do, but that's why just
4 in the spirit of, you know, courts liking to be coordinated
5 --

6 MR. COSENZA: Yes.

7 THE COURT: -- with each other and not stepping on
8 each other's toes.

9 Yes, I absolutely have exclusive jurisdiction over
10 these claims, they're not disputing that, they need to do
11 what they need to do in terms of their organic documents,
12 that sounds like that's all they're doing, no more, no less.
13 The best solution is you be kept in the loop so that you can
14 satisfy yourself that there's nothing untoward --

15 MR. COSENZA: Sure.

16 THE COURT: -- that's going on. So --

17 MR. COSENZA: Your Honor, so one other -- I guess
18 one last issue and then a follow up.

19 There's also discussion by Mr. Top they have made
20 efforts to reach out to some of the loan servicers.

21 There were -- we had during our meet and confer
22 session last week they were very open in describing the
23 progress that they've made. There seemed to be two or three
24 loan servicers that there have been issues with. I think
25 subsequent to our meeting and at our request they've now

1 served a subpoena on one of those servicers, but I do think
2 there may be one or two others that have been slow in
3 responding to the trustees' request, and you know, we've
4 been urging the trustees and their counsel to use -- at your
5 direction use the Court's subpoena power and direct some of
6 the servicers to, you know, be more proactive -- you know,
7 be more vigorous in terms of responding to requests.

8 THE COURT: Okay.

9 MR. COSENZA: So that's another issue that may
10 come up again down the road. Their servicers remain slow in
11 turning over files.

12 THE COURT: Right. So that's an issue for them as
13 they continue to proceed towards the next milestones.

14 MR. COSENZA: Correct. And the last issue, Your
15 Honor, (indiscernible) again as I mentioned before, there's
16 a -- this is a helpful start, there's lots of work that's
17 going to be done to the next few steps of the protocol we
18 expect. A large number of the files that we're receiving to
19 go back to the trustees, and this is going to be part of the
20 meet and confer process the business efforts, and then if
21 there's no resolution there onto the claims facilitation
22 process.

23 So the protocol is working. I hope the next steps
24 continue to -- continues to work as it goes along, and it's
25 going along I think as we had hoped for in December, and

1 hope the next steps continue along that path.

2 THE COURT: Okay. All right.

3 MR. COSENZA: Thank you.

4 THE COURT: Anything else? All right. Thank you
5 all for coming in.

6 (A chorus of thank you)

7 THE COURT: Enjoy the rest of your summer.

8 (Pause)

9 MR. HOROWITZ: Good morning, Your Honor, Maurice
10 Horowitz, Weil, Gotshal & Manges on behalf of --

11 THE COURT: Good morning.

12 MR. HOROWITZ: -- Lehman Brothers Holdings Inc.,
13 as plan administrator.

14 The plan administrator is now going forward on the
15 four hundred and ninety-ninth omnibus objection to claims
16 with respect to claim number 67738, which amends claim
17 65647.

18 The claim was filed on November 20th, 2009 -- the
19 superseding claims with you filed on November 20th, which is
20 59 days after the bar date in these cases.

21 The claim was filed by Ontario Teachers' Pension
22 Plan Board against LBHI. It asserts that the claimant is
23 owes \$12.6 million based on LBHI guarantee of a transaction
24 between the claimant and Lehman Brothers Finance SA, one of
25 the -- one of LBHI's Swiss affiliates.

1 The claimant asserts that it's entitled to have
2 its claim deemed timely filed on a finding of excusable
3 neglect, which is an equitable determination, as this Court
4 knows, it requires consideration of all irrelevant
5 circumstances, including danger of prejudice to the debtor,
6 the length of the delay, the reason for the delay, and
7 whether the claimant acted in good faith.

8 The Second Circuit and this Court have
9 consistently taken a hard line in applying the Pioneer test
10 and focused on the reason for the delay.

11 Other factors which generally weigh in favor of
12 the claimant are only relevant in closer cases. This is not
13 a close case, Your Honor.

14 The excuse given by the claimant is that it was --
15 that it made a mistake or was confused about the existence
16 of the LBHI guarantee. It is the same excuse that's been
17 given by other claimants in the past. It's the exact same
18 excuse given by two of the claimants in this Court's
19 published decision at 433 B.R. 113, which was later affirmed
20 by the District Court at 445 B.R. 137.

21 These two claimants, as we cite in our papers,
22 said that they were trying to file a guarantee claim based
23 on a Libby guarantee, they said they were unaware of the
24 existence of the guarantee until after the bar date, the
25 Court rejected that as a basis for finding excusable neglect

1 and said that creditors bear the responsibility of
2 investigate and performing reasonable diligence to identify
3 the claims that they have against the debtors in this
4 bankruptcy.

5 This is a case where the claimant could certainly
6 have ascertained the existence of the guarantee. The
7 claimants ultimately sent a copy of the guarantee to its
8 counsel in preparing their (indiscernible) questionnaire --
9 the guarantee questionnaire which was required by the bar
10 date, to possess the guarantee, and it could have conducted
11 diligence to locate it and determine that it should be filed
12 with the LBF -- together with the LBF transaction.

13 So for this reason, Your Honor, we would request
14 that the Court expunge the claim with prejudice. We have no
15 other -- nothing else to add to our papers unless the Court
16 has any questions.

17 THE COURT: All right. Thank you very much.

18 Good morning.

19 MR. ROLLIN: Good morning, Your Honor. William
20 Roll of Sherman & Sterling, appearing on behalf of Ontario
21 Teachers' Pension Plan Board. It's nice to be back here.

22 THE COURT: Welcome back.

23 MR. ROLL: Your Honor, three things are happening
24 here as I hear counsel. First LBHI is engaging in what I
25 would consider an overly restrictive reading of the cases

1 governing the situation here. Secondly --

2 THE COURT: How is that?

3 MR. ROLL: Well because they're -- the application
4 of the Pioneer factors, the delineation of what can
5 constitute excusable neglect with respect to late-filed
6 claims. They would have it that the only thing that matters
7 is that is -- and the only thing that would constitute
8 excusable neglect would be circumstances beyond the control
9 of the creditor.

10 They poo poo the fact that a mistake can
11 constitute excusable neglect, but Pioneer itself made it
12 clear that it is not just something outside the creditors'
13 control. It can be a mistake, it can be a foul up, it can
14 be carelessness, it can be negligence in the classic sense,
15 any of those can constitute excusable neglect in the right
16 case.

17 It referred to that standard as an elastic concept
18 and it said -- the Supreme Court said that at root this is
19 an equitable determination.

20 So despite what the Second Circuit might have said
21 -- and we'll get to that in a second -- and despite what
22 this Court in earlier instances might have said, it's still
23 the Supreme Court's words that govern the determination of
24 this, and the Supreme Court itself has said you can have
25 excusable neglect when you have a simple mistake, you have a

1 simple overlooking of something, it doesn't have to be a
2 bolt out of the blue that constitutes an intervening
3 circumstance. And the court said in addition you have to
4 look at all relevant circumstances. So that's the standard.

5 THE COURT: But so let's stay there though.

6 MR. ROLL: Uh-huh.

7 THE COURT: Because Ontario possessed the
8 guarantee, they had the guarantee, they filed the claim in
9 LBF's case --

10 MR. ROLL: Right.

11 THE COURT: -- and they filed two other proofs of
12 claim in these cases.

13 MR. ROLL: They did. They did. Which --

14 THE COURT: So --

15 MR. ROLL: Well that goes to one of the facts that
16 I think is actually pertinent here that the plan
17 administrator overlooks, and is that we have -- we
18 consciously -- the creditor here consciously endeavored to
19 comply with the bar date. Not just here but in the Swiss
20 proceeding as well.

21 THE COURT: Right. But then -- so okay. So
22 that's what you did, and then later on other or different or
23 the same lawyers think of something else, and they say,
24 let's go file that --

25

1 MR. ROLL: Uh-huh.

2 THE COURT: -- we missed it the first time we
3 looked at the claim.

4 There's no way with integrity and consistency and
5 equitably to say that if you in good faith have the
6 documents, do an analysis, file claims, but you miss a
7 theory or you miss something that you then can't assert as
8 an amendment, because we all know what the rules are --

9 MR. ROLL: Uh-huh.

10 THE COURT: -- with respect to amendment and
11 relation back, that that's okay. And that -- and I'm not a
12 fan of the slippery slope argument.

13 MR. ROLL: Right.

14 THE COURT: But if ever there were a slippery
15 slope argument and it's in a case like this there have been
16 any number of claimants in this exact situation.

17 MR. ROLL: Right.

18 THE COURT: Do I feel bad? Yeah, I feel bad,
19 okay? It's a teacher' pension fund. But I've said it on
20 many occasions, that can't be the driver, right, nor can it
21 be the driver that it's just quote/unquote an X million
22 dollar claim, a tiny, you know, minnow in the giant pond of
23 Lehman. There have to be rules consistently applied to
24 everybody, otherwise it doesn't work.

25 MR. ROLL: I fully agree, Your Honor. But one of

1 the rules to be applied here is the application of the four
2 Pioneer factors. The plan administrator itself concedes
3 that two of those, that we acted in good faith and the
4 length of the delay not being over the (indiscernible), here
5 it was 59 days, favor us. So those are off the table.

6 THE COURT: Agreed.

7 MR. ROLL: We've satisfied those. So --

8 THE COURT: Right.

9 MR. ROLL: -- what we have left is the reason for
10 the delay, which we we've been talking about, and then
11 secondly whether there's the risk of prejudice to the
12 debtor, prejudice to the process. And on that there's no
13 evidence in this record that allowing this claim to go
14 forward will actually result in that or would have changed
15 they things. They were aware of this.

16 THE COURT: But think of -- but I have had, I
17 won't be able to remember the claimant now, but I have had
18 claims just like this one --

19 MR. ROLL: Uh-huh.

20 THE COURT: -- where in-house counsel or a person
21 acting on behalf of a governmental authority missed a claim.

22 MR. ROLL: Right.

23 THE COURT: Missed a claim, misunderstood how to
24 read -- one that I can recall -- how to read the bar notice,
25 didn't believe, or so it asserted, that it applied to claims

1 arising from executory contracts, it believed it had an
2 executory contract, they were simply wrong and further
3 diligence would have revealed that they should have filed
4 the claim.

5 So there is a process point that is very important
6 to apply the rules and the parameters consistently even if
7 -- and this is different -- the floodgates argument is
8 different from the slippery slope -- even if there were no
9 floodgates, right, because we're on the four hundred and
10 ninety-ninth --

11 MR. ROLL: Uh-huh.

12 THE COURT: -- omnibus objection, right? Even if
13 there were no floodgates there's still a consistency
14 argument that the rules need to be consistently applied by
15 the Court with respect to each claimant who says I missed
16 it, excusable neglect.

17 MR. ROLL: Understood. But to take Your Honor's
18 point a little further.

19 What that would really mean is that in every
20 circumstance there has to be a bright line determination.
21 That's different from what is Supreme Court has said.
22 That's different even from what the Second Circuit said.

23 THE COURT: But I agree with you. I'm certainly
24 going to follow what the Supreme Court said, so I'm
25 listening to the facts as you --

1 MR. ROLL: Right.

2 THE COURT: -- tell them to me and I'll make a
3 determination.

4 MR. ROLL: And here are the facts, and I started
5 to elude to this.

6 This claim that was missed -- missed the bar date
7 by 59 days was known to the debtors months and months and
8 months before the claims reconciliation process even
9 started. Months and months and months before the plan
10 negotiation process started. There was nothing about the
11 late filing of the claim that impeded the process
12 (indiscernible) large, and that's one of the principal
13 considerations that the Supreme Court says you look at. You
14 look at the risk of prejudice to the debtor, you also look
15 at the risk of prejudice to the process. None of that
16 occurred here.

17 Secondly, we were not -- and I eluded to this
18 earlier too, but let me flesh it out. We were not
19 attempting to -- the creditor was not attempting to game the
20 system or find some strategic advantage, there was outright
21 confusion over whether and to what extent this had to be
22 filed here, had to be filed in Switzerland --

23 THE COURT: Okay. But Mr. Roll, let's be very
24 blunt, okay? You know, and I know you know, that when it
25 comes to bar dates the rule is you file the claim.

1 MR. ROLL: Yes.

2 THE COURT: When it comes to bar dates the rule is
3 you have a question about filing a claim, you don't resolve
4 that against filing the claim, you file the claim. You file
5 four claims and you get three of them expunged. You file
6 the claim because bar dates are bar dates, they're not
7 aspirational goals, they're not guidelines, they're meant to
8 mean something.

9 MR. ROLL: I understand, Your Honor.

10 THE COURT: Right?

11 MR. ROLL: And we adhere to that principal by
12 dutifully filing and duly filing the two claims here that
13 were timely where we did have all the things in front of us,
14 and the one in Switzerland, which was also timely.

15 So it was -- I know Your Honor knows that I know
16 what bar dates are all about, and I agree with that
17 generally, but there is flexibility in the cases and in the
18 statute. Bankruptcy Rule 906(b) allows for flexibility.
19 You wouldn't have that concept of excusable neglect if there
20 weren't some allowance built into the process for --

21 THE COURT: Sure, but --

22 MR. ROLL: -- a situation like this where nobody
23 gets hurt.

24 THE COURT: Right. Right. But this is different
25 from a situation in which Ontario, for example, reasonably

1 had an attorney that was engaged to do this, it was not a
2 bad choice of an attorney, the attorney was otherwise, you
3 know, reasonable and competent and there was a failure to
4 receive notice or there was an illness that prevented him
5 from complying or there was a snowstorm that prevented the
6 FedEx from delivering the proof of claim to the claims
7 agent. I could name -- I could go on for an hour coming up
8 with things that would be right in the wheelhouse of
9 excusable neglect, and this one is we missed the claim. We
10 had the documents, we thought about it, we didn't file the
11 claim, now we've thought better of it, and that's --

12 MR. ROLL: We came across -- we collectively, we
13 counsel -- and it's all different people by the way, because
14 we're five years down the road -- and I'll come back to that
15 too in a second -- but we just found the document in the
16 course of complying with other aspects of the bar date
17 order. It was in the course of doing a questionnaire for
18 the LBHI guarantee with respect to the LBSF claim.

19 Actually I should pause a minute because the plan
20 administrator's paper suggest that we had this document in
21 hand at the time we filed the other two claims that we're
22 talking about. That's not correct. We did not. We came
23 across this document, we, collectively counsel and the
24 creditor came across this particular guarantee at the time
25 we were putting together the questionnaire with respect to

1 the LBHI guarantee to the LBSF claim, which was timely
2 filed.

3 THE COURT: I'm sorry, now I'm confused. The
4 reply filed by the estate says that OTPPB possessed a copy
5 of the LBF guarantee prior to the bar date and managed to
6 file a timely claim against LBF in LBF's insolvency
7 proceeding.

8 MR. ROLL: And there's -- we don't know that. And
9 what I'm saying to Your Honor, what we do know, what
10 Mr. Torkin, who's no longer with my firm, said in his
11 declaration five years ago, which is the only thing we can
12 rely on today, what he says is it was in the course of
13 preparing the questionnaire. The second step following the
14 bar date with respect to these derivative claims. The
15 questionnaire with respect to the one that was timely filed
16 we realized that the guarantee we were given was a different
17 guarantee.

18 THE COURT: When was the claim -- was the claim
19 filed in LBF's case filed before the bar date in this case?

20 MR. ROLL: I think it was roughly around the same
21 time. I'm not sure of the exact date. I'm not familiar
22 with the bar date itself in --

23 THE COURT: Well, I mean if you want to rely on
24 the notion that there was a missing document that
25 notwithstanding diligence you didn't have that's something

1 that you would need to establish, and now all I have, I have
2 the estate telling me that you had the guarantee prior to
3 the bar date, and that's uncontroverted as of this moment.

4 MR. ROLL: Well not really. If you look at
5 Mr. Torkin's declaration what he says is in the course of
6 doing the questionnaire for the LBSF -- the LBHI guarantee
7 of the LBSF claim we realized we had this.

8 THE COURT: Okay. You're not --

9 MR. ROLL: So that doesn't mean --

10 THE COURT: -- answering my question. Did you
11 have the LBF guarantee prior to the bar date in these cases?

12 MR. ROLL: I don't know the answer to that, Your
13 Honor.

14 THE COURT: Well --

15 MR. ROLL: And we -- part of the problem here is
16 we're five years and four hundred and fifty-nine omnibus
17 objections to claims later than when that first came up. So
18 the people at my firm who did this are no longer around or
19 accessible to us, or easily accessible to us, there's been
20 turnover at the client. So it's --

21 THE COURT: But the burden is on you --

22 MR. ROLL: -- hard to determine this kind of
23 thing.

24 THE COURT: -- to establish excusable neglect.

25 MR. ROLL: I understand that.

1 THE COURT: So therefore in support of that
2 establishing that in fact you didn't have the document
3 before the bar date despite reasonable diligence would be a
4 good fact, but you haven't established that.

5 MR. ROLL: But -- well we've established that we
6 don't -- that we have no -- nothing suggests to us that we
7 did have it before the bar date, we came across it after the
8 bar date. I think Mr. Torkin, because he was under oath,
9 and I can understand this, he didn't want to say
10 definitively we didn't have it, we had a bunch of papers,
11 but we did not have what we believed to be -- what we
12 thought necessary to use at the time. We didn't have that.
13 Because if we'd had it -- if we knew we had it we would have
14 filed it at that point.

15 THE COURT: Well but this is -- you're not
16 testifying.

17 MR. ROLL: I understand that.

18 THE COURT: So I -- so the record as it exists is
19 you haven't established that you didn't have the guarantee
20 prior to the bar date. That doesn't necessarily mean that
21 that fact would be dispositive because the Lehman filing
22 occasioned -- you know, there was a big gap between the
23 filings and the bar date, and it occasioned the mad scramble
24 of people finding all of their Lehman documents, and that's
25 the reason you give notice of a bar date is so people can

1 find all their Lehman documents.

2 MR. ROLL: I understand, Your Honor, and I
3 apologize for not being crisper on this in responding to
4 this earlier, but I'm now looking at Mr. Torkin's
5 declaration. If one looks at paragraphs 14, 15, and 16 --
6 and this is a declaration attached to our original --

7 THE COURT: Uh-huh.

8 MR. ROLL: -- objection back in 2010, he says in
9 paragraph 14, "On or about October 27, 2009 ..."

10 THE COURT: Right.

11 MR. ROLL: Bar date is September 22nd. "On about
12 October 27 it came to my attention that an LBHI/LBF
13 guarantee might exist. I immediately contacted OTPPB to
14 confirm its existence."

15 In the next paragraph he then asks the Ms.
16 Sheridan, the associate working with him at the time, to
17 review her files to determine whether the firm is in
18 possession of a guarantee. And she told him, as it says in
19 paragraph 16, "That following bar date ..." --

20 THE COURT: Okay. Hold on.

21 MR. ROLL: "Following the bar date."

22 THE COURT: When was the bar date?

23 MR. ROLL: September 22nd, 2009. Torkin learns of
24 it on October 27th, as he says here, he then asks Sheridan
25 to check into it, she checks into it and says she doesn't

1 have it in her files. Well after reviewing the files she
2 tells him that she was sent a copy in connection with the
3 completion of the guarantee questionnaire for the LBHI/LBSF
4 guarantee.

5 So that's the fact -- that's an uncontroverted
6 fact, and it's that fact that the plan administrator
7 actually slides past in its position here. And again, I
8 apologize for not being a little more forceful about this, I
9 had forgotten about that particular exchange myself. But
10 Mr. Torkin in his declaration here establishes as an
11 uncontroverted fact that we did have it after the bar date,
12 or he believes and the associate working with him believed
13 at the time this first came up that we didn't have this
14 until after the bar date, and that as soon as we got it we
15 went out and filed it and we let them know and we began
16 negotiations over all the claims, et cetera, et cetera, as
17 it is recounted in the rest of the declaration. And again,
18 that was months before the plan reconciliation process.

19 Now -- and what happened, they objected in the
20 forty -- what was it, the fortieth omnibus objection to
21 claims, we responded, as you see here with Mr. Torkin's
22 declaration, they withdraw objection to the claim without
23 prejudice so they could evaluate our position. That was
24 five years ago. So five years and --

25 THE COURT: But you're -- go back to the beginning

1 of the declaration. After the LBHI case started --

2 MR. ROLL: Uh-huh.

3 THE COURT: -- there was a lawsuit that was
4 commenced, right?

5 MR. ROLL: On the other guarantee I believe.

6 THE COURT: Right.

7 MR. ROLL: Right.

8 THE COURT: Okay. And --

9 MR. ROLL: That was a lawsuit against LBSF.

10 THE COURT: Right. And now we're talking about an
11 LBHI guarantee, right?

12 MR. ROLL: The LBF obligation. So it's -- I was
13 little confused by the --

14 THE COURT: What's the nexus between the LBSF suit
15 and the claim that you're seeking to have be deemed timely
16 allowed?

17 MR. ROLL: No legal nexus, it's just he's setting
18 -- Mr. Torkin is setting forth the background by which we
19 were asked to get involved in this. We got involved before
20 the Chapter 11 filings in fact. And we sued on the LBSF
21 claim in October -- early October before LBSF filed its
22 Chapter 11 petition.

23 So he's -- I believe what he's trying to there is
24 simply indicate this is how we got involved, this is what we
25 were asked to do, these are the things we did do, the

1 Chapter 11 filings occurred, the insolvency proceeding in
2 Switzerland ensued, the Chapter 15, and here the bar dates
3 came and we filed what we filed. Then later we learned, you
4 know, we should have filed another claim based on this
5 guarantee.

6 So, you know, admittedly it's not the clearest
7 record just because time has passed, just because we have --
8 we have clouded memories, we have different people on the
9 scene, we have the things that happened when you have five
10 years past. This -- and we did determine -- we did try to
11 determine whether there was something better, something
12 fully we could put in in terms of proof than what we had
13 here, but in conscience we couldn't. I mean this is based
14 on peoples' recollections at the time. Peoples'
15 recollections today are necessarily not as good.

16 THE COURT: Okay. Well I mean for the sake of
17 argument we'll -- let's say those are the facts, okay? And
18 the estate will argue it doesn't matter.

19 MR. ROLL: Right.

20 THE COURT: Doesn't matter, still doesn't
21 constitute excusable neglect.

22 MR. ROLL: Right. They will. And what they would
23 be doing, if they did that, is they would be running afoul
24 of the Supreme Court in Pioneer. And I would point
25 specifically to Justice White's majority opinion. In

1 footnote 14, referring to the decent, he says:

2 "The decent -- not the deal that prevailed -- the
3 decent would permit judges to take account of full
4 range of equitable considerations only if they had
5 first made a threshold determination that the movant is
6 sufficiently blameless."

7 That's exactly the standard they're advocating
8 here, and it was rejected by the majority in Pioneer.

9 And the Second Circuit, let's talk about the hard
10 line --

11 THE COURT: What do I do about the same facts,
12 lawyers on the scene looking at documents missing something?
13 In every one of those cases I would have to say that's no
14 problem --

15 MR. ROLL: No.

16 THE COURT: -- you get to file.

17 MR. ROLL: Respectfully, Your Honor, you wouldn't
18 in every one of those cases, because what you would have to
19 do --

20 THE COURT: I would have to go back and reconsider
21 an order that I entered regarding a hospital in -- somewhere
22 in the middle of the country.

23 If I were to grant you the relief that you seek
24 today it would be entirely inconsistent with my not having
25 allowed a claim based on the fact that the attorneys say

1 they misread, they didn't understand the bar date to require
2 them to file a certain type of claim because they thought
3 they had an executory contract. It's the same thing.

4 MR. ROLL: Well, Your Honor, I wasn't involved in
5 those other things.

6 THE COURT: No, and I don't mean to ambush you,
7 I'm just sharing with you the equitable problem of treating
8 similar in the same way.

9 MR. ROLL: I understand. But this is a huge case,
10 we all know that, we hear it said a thousand times. There
11 are a lot of different situations, and the only reason that
12 Your Honor would actually have to go back and relook at
13 those situations is if Your Honor felt that the Court hadn't
14 taken into account all of the equitable factors that Pioneer
15 and the Second Circuit cases say you should look at.

16 THE COURT: And how do I square the relief that
17 you want with Judge Peck's decision in the 2010 case?

18 MR. ROLL: Very simply. I think an important
19 element of Judge Peck's decision and an important element of
20 the Enron decision by the Second Circuit, which they rely on
21 a lot, is the notion of -- Judge Peck talks about confusion,
22 and I think it was some confusion here because of the multi-
23 jurisdictional nature of this -- but there's also an
24 undercurrent of was there actually an effort made to comply
25 with the bar date or was there just indifference? Those are

1 two different things.

2 Here we don't have indifference, we don't have a
3 cavalier attitude. Here we have let's get these filed,
4 let's file everything we know about.

5 THE COURT: That's the same thing that happened in
6 the other case. There was not indifference at all, there
7 was let's read this bar date notice, we're reading it this
8 way, we're doing this, we're not doing that, and then uh-oh,
9 later -- you know, I mean the fact that they are -- that
10 it's multi-jurisdictional, the fact that it can be multi-
11 debtor, right?

12 MR. ROLL: Uh-huh.

13 THE COURT: I mean bar dates can say -- bar
14 notices can say by the way, okay, if you file it in the
15 wrong debtor case it's okay, or bar notices can say it's not
16 okay, you better find out which debtor among, you know, the
17 258 Adelpia debtors, just to pick a random example, you got
18 to do your diligence, you got to figure it out. That's why
19 bar date notices -- I'm not telling you something you don't
20 know of course -- the period is not five days, the period is
21 a long time.

22 MR. ROLL: I understand that, Your Honor, and I
23 cannot in conscience stand up here and say --

24 THE COURT: I know.

25 MR. ROLL: -- it was anything other than a

1 mistake. It was a mistake.

2 But I do think that there's sufficient flexibility
3 in the case law, in the rule, in the situation here, and in
4 terms of consistency with the Court's prior rulings on these
5 things, and it's because it's an equitable determination in
6 each case.

7 And one last point and perhaps I've used up too
8 much of the Court's valuable time.

9 THE COURT: No, that's fine. That's fine.

10 MR. ROLL: The plan administrator makes a point of
11 saying the Second Circuit has taken a hard line on these
12 things, and you know, I read that, it's a nice sound bite,
13 but that actually comes from a case that didn't deal with
14 creditors missing bar dates. That hard line complication of
15 the Pioneer factors comes from the Civilvanch (ph) case I
16 think it is in 2003, which was a case of a deadline to file
17 an appeal and a tort action was missed, you know, and the
18 court there of course it took a hard line because it was a
19 clear violation of a clear and well-known and utterly
20 unambiguous court rule -- a statute. And the mistake there
21 was the lawyer who missed the deadline relying on an offhand
22 remark by another lawyer.

23 THE COURT: Right. But -- right. But --

24 MR. ROLL: And so that's -- but that's the kind of
25 balancing the courts do.

1 THE COURT: I understand that, but here the bar
2 date is very clear. It says probably in multiple places in
3 bolded language with blinking lights, this is really
4 important, file a claim or you will be forever barred.

5 MR. ROLL: And we read it.

6 THE COURT: Right?

7 MR. ROLL: And we told the client.

8 THE COURT: Right. And therefore it was -- and
9 therefore when the lawyers speak to the clients they say,
10 this is really important because you got to send me all your
11 stuff and it was missed. I get it, people are human beings,
12 I get it. Let me hear from the estate again.

13 MR. ROLL: Certainly. Thank you, Your Honor.

14 MR. HOROWITZ: So I just want to --

15 THE COURT: Are you ready to fall on your sword,
16 are you ready to give up?

17 MR. HOROWITZ: I -- actually I want to clarify
18 something --

19 THE COURT: Sure.

20 MR. HOROWITZ: -- in our reply, because there was
21 a lot of colloquy that could have short circuited.

22 When we say that the -- that the claimant
23 possessed a copy of the LBHI guarantee we mean the claimant,
24 we don't mean Sherman & Sterling or the attorney who was
25 preparing those --

1 THE COURT: The claimant. Right.

2 MR. HOROWITZ: The claimant.

3 THE COURT: Right.

4 MR. HOROWITZ: Because the declaration says the
5 LBHI guarantee was sent to me in connection with preparing
6 the LBSF guarantee.

7 THE COURT: Right.

8 MR. HOROWITZ: So that was what we mean. And then
9 the point is that it is the obligation of the claimants to
10 diligence --

11 THE COURT: Well that's the point I just was
12 making with Mr. Roll --

13 MR. HOROWITZ: Right. So --

14 THE COURT: -- is that --

15 MR. HOROWITZ: Right. So it's -- we're not
16 casting any kind of, you know, aspersions on the firm, but
17 it is the claimant's obligation.

18 The -- Your Honor mentioned all the other
19 claimants whose claims have been expunged. Conway Hospital
20 is the --

21 THE COURT: Conway Hospital is the one that -- and
22 again, I don't -- it's not -- it's unfair to Mr. Roll to
23 talk about a case he's unfamiliar with, but it is Conway
24 Hospital, and I believe it was -- that my denial of that
25 application was recently affirmed on appeal.

1 MR. HOROWITZ: Correct, it was affirmed by the
2 District Court.

3 Other claimants have raised the same excuse of
4 having multiple proceedings. We've had claimants who said
5 that they had a guarantee claim and a claim against the
6 Dutch proceeding, one with CF Midas' claim, its claim was
7 expunged by this Court after a hearing. Dow Corning claimed
8 it was confused between the LBI proceeding and the LBHI
9 proceeding. That claim was expunged by this Court.

10 So that is another excuse or a reason for
11 (indiscernible) is consistently rejected by this Court.

12 The Second Circuit's hard line sound bite actually
13 comes from an Enron case from 2005 with very similar facts
14 to this. The claimant in that case was citing a case from
15 this other case from the Second Circuit, but it was applying
16 it to a bar date in the Enron case, and that claimant was
17 trying to file a guarantee claim against the parent. It had
18 filed a direct claim against the subsidiary debtor and it
19 realized later that it had a guarantee claim. It wanted to
20 both file a late claim and amend its already timely filed
21 claim. And the Bankruptcy Court, District Court, and Second
22 Circuit denied that request.

23 So again, Your Honor, we're just trying to run a
24 fair process, we're trying to treat everybody the same, and
25 so for that reason we request this claim expunged.

1 We can answer any -- I can answer any questions --

2 THE COURT: All right.

3 MR. HOROWITZ: -- the Court has.

4 THE COURT: Thank you. All right.

5 Could you come up for a moment? Mr. Roll, could
6 you come up for a moment?

7 MR. ROLL: Yes.

8 (At side bar off the record)

9 THE COURT: We're going to take a ten-minute break
10 and then we'll resume with the next item on the agenda. If
11 I could confer with the parties for a few moments I would
12 appreciate it. The parties in this matter. We'll come back
13 on the record in about 10 to 15 minutes.

14 (Recessed at 10:56 a.m.; reconvened at 11:07 a.m.)

15 THE COURT: All right. That brings us to the
16 trustee's supplemental objection to the amendment and
17 supplemental pleading to proofs of claim subject to the two
18 hundred and seventh omnibus objection.

19 MR. MITCHELL: Yes, Your Honor.

20 THE COURT: Good morning.

21 MR. MITCHELL: Good morning. Stuart Mitchell of
22 Hughes Hubbard & Reed, for the LBI trustee.

23 As Your Honor noted, yes, that is the matter that
24 we are now to. And as Your Honor will remember at the
25 sufficiency hearing on January 22nd with respect to the

1 trustee's two hundred and seventh omnibus objection the
2 Court heard arguments in connection with the claimants'
3 fraud claims which are at issue today.

4 The claims were based on the ownership of certain
5 high risk, highly restricted securities known as cash
6 settled call warrants.

7 The claimants' pleadings, prior to the
8 January 22nd hearing, consisted of in large part documents
9 incorporated by reference which dealt with other securities
10 and other matters unrelated to the claimants' purchase of
11 their warrants.

12 The Court granted the claimants one last
13 opportunity to plead an appropriate securities fraud
14 complaint.

15 The claimants did file an amended complaint in
16 which they transferred several passages from documents
17 previously incorporated earlier by reference; however, the
18 claimants did not remedy the fundamental flaw in their
19 pleadings. They still have not pled any facts sufficient to
20 give rise to a claim against LBI.

21 The claimants frame their claim as securities
22 fraud claims under Rule 10(b)(5) and under New York law, and
23 to establish such claims they must plead facts in accordance
24 with Federal Rule of Civil Procedure 9 and in accordance
25 with the Twombly standard, which requires that their

1 pleading establish plausible claims.

2 The facts must plead a material misrepresentation
3 from someone at LBI to the claimants in connection with the
4 securities they purchased.

5 They must -- with respect to that material
6 statement it must be made with scienter, with knowledge of
7 the statement's falsity, and with the intent to defraud.

8 And then the claimants must allege or pled that
9 they relied on that statement or misstatement to their
10 detriment.

11 The claimants have not pled any of these elements
12 with the requisite particularity, instead the claimants in
13 part make general and unsupported claims of alleged LBI
14 guarantees of LBHI's liquidity. These claims fail for two
15 reasons.

16 First, the claims do not cite to any specific
17 statements made by LBI representatives to the claimants
18 which could be construed in any way as a guarantee of LBHI's
19 liquidity upon warrant maturity dates.

20 And second, the warrant PPMs, which each of the
21 claimants acknowledge they relied on, clearly put the
22 claimants on notice that they could have lost their entire
23 investment in the warrants in the event of, among other
24 things, LBHI's illiquidity on the warrant maturity dates.

25 Moreover, Your Honor, the claimants fail to plead

1 facts sufficient to establish that anyone at LBI believed,
2 let alone knew, that the time the claimants purchased the
3 warrants LBHI would not be able to honor its obligations.

4 The claimants' general obligations with respect to
5 this alleged LBI guarantee of LBHI liquidity fail to
6 establish any plausible claim of fraud.

7 Further, as the claimants did in their previous
8 proceedings, they continue to seek to attribute statements
9 on actions of LBHI to LBI. The claimants have not
10 established an illegal or factual framework for justice this
11 unprecedented step.

12 Specifically in their most recent pleading the
13 claimants seek to attribute statements in LBHI SEC filings
14 to LBI by the application of the necessary or inevitable
15 framework applied by the Supreme Court in the case of Janus
16 Capital Group, Inc. v. First Derivative Traders. However,
17 Janus does not morph the LBHI SEC filings into alleged
18 misstatements by LBI.

19 Applying the Janus frameworks to this facts in
20 this case shows that the statements complained of by the
21 claimants are first and last attributable to LBHI. LBHI
22 filed the SEC statements referenced by the claimants. The
23 SEC statements are clearly attributed to LBHI in the PPMs.

24 As the author and filer of the statements it is
25 the actions of LBHI that make any alleged misstatements in

1 the SEC filings necessary or inevitable.

2 Neither do the claimants plead adequate reliance
3 on the LBHI SEC filings. In a similar case before Judge
4 Kaplan plaintiffs had purchased cash settled call warrants,
5 very similar to the warrants held by the claimants, pressed
6 claims against former officers and directors of LBHI in
7 connection with certain LBHI SEC filings incorporated into
8 the offering documents of their warrants. In that case
9 Judge Kaplan noted that the statements in the SEC filings
10 were clearly the statements of LBHI, but found that the
11 plaintiffs did not establish fraud because they did not
12 plead -- that they either specifically read or specifically
13 relied on the SEC filings when making their decision to
14 purchase the warrants. The claimants' pleadings in the case
15 suffer from the same efficiency.

16 Finally, as noted in the trustee's papers as the
17 Court is aware and the claimants have acknowledged, they
18 filed claims for the same identical securities in a separate
19 Chapter 11 proceeding.

20 The claimants' allegations of fraud are undercut
21 by the allowance of their claims in that proceeding. The
22 Chapter 11 debtors did not allow their claims on the premise
23 that the warrants were fraudulent securities. To the
24 contrary, the LBHI claims were allowed in accordance with
25 the Chapter 11 debtor's two hundred and eighty-first omnibus

1 objection, which was premised on -- which premised the
2 allowance of the warrant claims on the legitimate
3 obligations of LBHI.

4 The Chapter 11 debtors filed their two hundred and
5 eighty-first omnibus objection to have the claims allowed at
6 their fair market value in accordance with the terms of the
7 warrants.

8 The trustee agrees with the Chapter 11 debtor's
9 with respect to their statement that the holders of the
10 warrant claims should not be allowed to recover more than
11 the value of their claims.

12 It would be inconsistent now to allow these claims
13 to go forward based on an alleged fraud in connection with
14 the warrants for LBHI, the issuer and counterparty of the
15 warrants has acknowledged the legitimacy of the exact same
16 securities held by the same claimants.

17 For these reason, Your Honor, and for the reasons
18 articulated in the trustee's filings, the claimants have
19 failed to plead an appropriate securities fraud complaint
20 and cannot do so.

21 Therefore, unless this Court has further questions
22 the trustee respectfully requests that the relief sought in
23 the two hundred and seventh omnibus objection and the
24 trustee's supplemental objection be granted to the claims,
25 including the amended and repleaded claims be disallowed and

1 expunged in their entirety.

2 THE COURT: Thank you.

3 All right. Good morning.

4 MS. ALPERSTEIN: Good morning, Your Honor. My
5 name is Robin Alperstein, and I'm with Becker, Glynn on
6 behalf of the claimants.

7 THE COURT: Okay.

8 MS. ALPERSTEIN: I'm going to address specifically
9 the sufficiency of our legal claim with respect to counsel's
10 last argument. My colleagues, either Chester Salomon or
11 Alec Ostrow, will address that specific point about the
12 prior LBHI case, the recovery with respect to the claims --

13 THE COURT: Okay.

14 MS. ALPERSTEIN: -- brought against LBHI.

15 THE COURT: Okay.

16 MS. ALPERSTEIN: I'm just going to talk about the
17 legal sufficiency of our 10(b)(5) claim.

18 THE COURT: Okay.

19 MS. ALPERSTEIN: Thank you.

20 First, I'd like to talk very briefly about the
21 framework of our claims before I address his specific legal
22 objections that he has made, because I think there's a bit
23 of a disconnect between what we've actually alleged and how
24 he has attempted to frame it for Your Honor.

25 In particular, this is a fraudulent omission case

1 against LBI, not against LBHI, and in particular it is a
2 case that is premised on omissions that were made by LBI in
3 it's PPM and through its agents, its brokers, in connection
4 with the placement of the warrants.

5 Specifically the PPM contained false statements
6 and omissions concerning the truth about LBHI's actual
7 financial condition. The truth about that financial
8 condition was not disclosed in the PPMs, it was not appended
9 to the risk factor that he cited, which I will get to.

10 THE COURT: Yeah, but this is the attribution
11 issue.

12 MS. ALPERSTEIN: That's a separate issue. I'm
13 talking now about the omissions.

14 The attribution issue is that LBI -- LBI
15 promulgated and placed that PPM and sent its brokers out to
16 call up our clients and solicit them without ever mentioning
17 that the true state of LBHI's financial condition was not
18 what had been represented and what was being represented in
19 that PPM.

20 THE COURT: So if that's what you're focusing on
21 then what were the statements that were made? What were the
22 -- there are no allegations of any specific statements that
23 were made to specific people.

24 MS. ALPERSTEIN: The allegation is that the
25 brokers omitted to state the true financial condition,

1 omitted to state the existence of accounting for at the
2 highest levels of LBHI, and therefore falsely represented --

3 THE COURT: And that they -- so the allegation is
4 that -- so there's a PPM, it's issued by LBHI.

5 MS. ALPERSTEIN: Well it's placed -- the issuance
6 is true.

7 THE COURT: Who -- the issuance is true.

8 MS. ALPERSTEIN: But it's placed and promulgated
9 by LBI.

10 THE COURT: Okay. You -- okay. I don't know what
11 significance you're attaching to the promulgated, but the
12 PPM is issued by LBHI, those are the statements of LBHI.

13 Next you say that someone, unnamed, at LBI got on
14 the phone knowing with scienter, calling your clients and
15 saying I've got this security for you.

16 MS. ALPERSTEIN: With respect, Your Honor, that is
17 not what we're saying, and there are specific names in the
18 complaint.

19 With respect LBI, the entity, had corporate
20 scienter for the falsity of the PPM, and --

21 THE COURT: Say that again. LBI --

22 MS. ALPERSTEIN: LBI the entity had scienter for
23 the falsity of the PPM and the falsity of the statements in
24 the PPM.

25 THE COURT: Had scienter for. I don't know what

1 that means.

2 MS. ALPERSTEIN: It means that LBI as a corporate
3 entity knew that the PPM contained false and misleading
4 statements about LBHI.

5 THE COURT: Well, okay. Okay. And what fact do
6 you -- what do you allege beyond that conclusory statement?
7 You are -- your allegation is that LBI should be held
8 responsible for an allegedly false statement by LBHI.

9 MS. ALPERSTEIN: My -- our argument is that LBI
10 should be held responsible for its own false statements and
11 omissions that it made through its brokers and by its
12 adoption of the PPM.

13 I think you're assuming that the PPM -- that the
14 maker of the statements in the PPM was LBHI. LBI's name is
15 on that PPM. LBI put forward that PPM.

16 THE COURT: LBI is referenced on the cover page.
17 LBHI is not the issuer of the PPM. Anybody reading it knows
18 that these are securities that are being issued by LBHI.
19 They're LBHI securities.

20 MS. ALPERSTEIN: The warrants are LBHI securities,
21 that is true.

22 THE COURT: Right.

23 MS. ALPERSTEIN: But the PPM was put forward by
24 Lehman in connection and together with LBHI.

25 THE COURT: You say together with LBHI, but you

1 don't allege any basis on which to attribute these
2 statements and the knowledge of LBHI to LBI.

3 MS. ALPERSTEIN: LBI's officers and directors were
4 the ones who created the accounting scheme, perpetrated it,
5 engaged it.

6 THE COURT: What accounting scheme?

7 MS. ALPERSTEIN: The accounting scheme that we
8 detail in our -- to the -- that we detail for 150 paragraphs
9 in our claim that's also mentioned by Judge Kaplan and that
10 the examiner found to failure to disclose the truth about
11 its financial condition with respect to the liquidity risk,
12 the risk concentration, the mortgage valuation transactions,
13 the risk management practices, the credit risk
14 concentration, and the Repo 105 transaction.

15 THE COURT: And -- okay. So all of that, we take
16 that as all being true with respect to LBHI, you say, right?

17 MS. ALPERSTEIN: Yes.

18 THE COURT: And what's the basis on which LBI can
19 be guilty of securities fraud for that conduct?

20 MS. ALPERSTEIN: We are not seeking to hold LBI
21 accountable for that specific securities fraud.

22 What we are saying is that the LBI officers and
23 directors who perpetrated that fraud on behalf of LBHI knew
24 about that fraud. So they knew that the statements that
25 were made in the PPM were false. They knew those statements

1 about LBHI were false, and then they sent their brokers out
2 to target customers and represent that this was a good
3 investment knowing that the likelihood that LBHI could ever
4 potentially pay out was far less than had been represented
5 in that PPM.

6 THE COURT: Well what allegation is there that's
7 more than conclusory and that's plausible under the standard
8 of Iqbal and Twombly that anyone at LBI knew what you are
9 saying is the case?

10 MS. ALPERSTEIN: The very same people perpetrated
11 the scheme. Let me give you specifics. Paragraphs 10
12 through 16 identify the officers, Fuld and O'Meara and
13 Lowitt and Gregory, et cetera, they have the same rules.
14 The CEO and chairman of the board --

15 THE COURT: They were on the -- so Dick Fuld was
16 on the phone to your clients peddling these securities. Is
17 that what you're saying?

18 MS. ALPERSTEIN: No, Your Honor, Dick Fuld was the
19 chairman of LBI. What he knew what he did in his capacity
20 at LBHI he also knew as the chairman --

21 THE COURT: Okay.

22 MS. ALPERSTEIN: -- and CEO of LBI. He had the
23 same knowledge.

24 THE COURT: Okay.

25 MS. ALPERSTEIN: It's imputable to LBI. And so

1 did the CFO, so did O'Meara. They knew that what they had
2 said and done on behalf of LBHI was not true. And then for
3 LBHI they went out and targeted customers without telling
4 them that truth. That's specifically alleged with
5 particularity. Their role in the scheme, their knowledge,
6 and it's imputable.

7 THE COURT: But so --

8 MS. ALPERSTEIN: Pardon me.

9 THE COURT: -- who made the phone calls?

10 MS. ALPERSTEIN: The brokers made the phone calls.

11 THE COURT: Okay. So did the brokers know about
12 the scheme?

13 MS. ALPERSTEIN: No, and they don't need to know
14 because the company has the scienter.

15 THE COURT: Okay. I'm going to ask you to just
16 bring it down --

17 MS. ALPERSTEIN: I apologize.

18 THE COURT: -- a couple of notches. I feel --

19 MS. ALPERSTEIN: I'm sorry, Judge.

20 THE COURT: All right? I'm simply trying to
21 understand, and it's clear to me that you see this very
22 clearly, and I'm simply trying to understand what you see so
23 clearly.

24 MS. ALPERSTEIN: Thank you, Judge.

25 THE COURT: Because I don't.

1 MS. ALPERSTEIN: Okay.

2 THE COURT: All right? So --

3 MS. ALPERSTEIN: Yes.

4 THE COURT: -- the purpose here is to give you the
5 benefit of the doubt.

6 MS. ALPERSTEIN: Thank you, Judge, and I do
7 apologize.

8 THE COURT: Is to give you the benefit of the
9 doubt under the legal standard to see if this claim gets out
10 of the starting gate.

11 So far I'm not with you, so I'm trying. All
12 right? I'm trying.

13 So why don't you point me to where in the pleading
14 you think that this is all set forth. And I have it, it's
15 filed at docket 11723, the amended and supplemental pleading
16 for the proofs of claim, right?

17 MS. ALPERSTEIN: That's correct.

18 THE COURT: Okay. So why don't you point me
19 specifically --

20 MS. ALPERSTEIN: Okay.

21 THE COURT: -- to the allegations that you've been
22 describing.

23 MS. ALPERSTEIN: Okay. Let's start with
24 paragraph 2, which is more of a summary.

25 THE COURT: Okay.

1 MS. ALPERSTEIN: On page 2 --

2 THE COURT: Uh-huh.

3 MS. ALPERSTEIN: -- the first full sentence on
4 page 2 in paragraph 2.

5 "The claimants' LBI brokers led them to believe
6 that if a reference fund hit its target there would be
7 no question that LBHI would pay them the specified
8 amount."

9 Okay. That's one.

10 THE COURT: Okay. And --

11 MS. ALPERSTEIN: Then --

12 THE COURT: And I'll let you keep going, but
13 here's one issue is that there is law that says that if a --
14 and I'm summarizing and simplifying -- but that if a broker
15 gives you a sales pitch, right, and then hands you a
16 document that says something completely different and
17 opposite that the document trumps the sales pitch.

18 So here the PPM says:

19 "An investment in the warrants involve substantial
20 risks, including the risk that investors may lose the
21 entire value of their investment in certain
22 circumstances."

23 MS. ALPERSTEIN: Correct.

24 THE COURT: So even if a broker said, don't worry
25 about that, all caps, all bold statement, everything is

1 great, buy these, right? Under exiting law as I understand
2 it the plaintiff would lose.

3 So we've got these PPMs, these are warrants,
4 right? They're not, you know, fixed return instruments, and
5 the premise of your claim is that the LBI brokers led them
6 to believe, fill in the blank, right?

7 So right off the bat we've got this kind of
8 disconnect between what you're saying occurred and what the
9 actual documents in the PPM issued by LBHI said.

10 MS. ALPERSTEIN: I think what I'm hearing now is a
11 disconnect between what I understand our claims to be and
12 the Court's understanding and our adversary's understanding.

13 In particular let me go with that risk factor.
14 The risk factor absolutely said you can lose your shirt if
15 LBHI cannot meet its obligations in the future.

16 THE COURT: Right. And what you're saying is the
17 broker said in that conversation look, the PPM says you
18 could lose your shirt, but I'm telling you right now you
19 have no worries, LBHI is as sound as, pick something that's
20 sound, not -- right? That LBHI is absolutely good,
21 wonderful, fully secure, you have nothing to worry about,
22 right?

23 MS. ALPERSTEIN: But here's the -- yes. But
24 here's the issue, Judge. We thought in this representation
25 contained in the PPM and in the public filings about the

1 company that misrepresents the ability of the company to be
2 able to meet its obligations --

3 THE COURT: Yes, but that's the attribution
4 problem.

5 MS. ALPERSTEIN: But it's --

6 THE COURT: That's different -- there's two sets
7 of statements. There's what the PPM says.

8 MS. ALPERSTEIN: Yes.

9 THE COURT: Then the issue is, is if there's a
10 misrepresentation in the PPM can that be attributed to LBI?
11 That's one issue.

12 Then there's the phone call issue, right? That
13 notwithstanding what it said in the PPM the LBI broker on
14 the phone, whether it was Dick Fuld or somebody, you know,
15 sitting in some cubicle somewhere, said to your clients,
16 I've got this product for you, the PPM makes it sound risky,
17 don't you worry, LBHI is completely solid, go ahead and
18 invest.

19 MS. ALPERSTEIN: But I think that's the
20 disconnect, Judge, because we're not saying that the brokers
21 contradicted the PPM. What we're saying is that the PPM was
22 false and misleading, including with respect to that risk
23 factor.

24 If I could just give you --

25 THE COURT: Okay. But then -- I'm trying to stay

1 with you here. But then it's a attribution thing. Then
2 you're seeking to hold LBI responsible for what you are
3 saying were the fraudulent misrepresentations of LBHI, which
4 is the issuer of the PPM, not LBI.

5 MS. ALPERSTEIN: I think that's not actually
6 correct, because LBI -- LBI is a broker/dealer with a
7 fiduciary obligation to its customers. It called up and
8 targeted its long-standing customers and said, here's a
9 great investment, it's a great opportunity, LBHI is
10 involved, and here's the PPM. It says that. LBI says that
11 knowing, its top brass knows, its CEO, its chair, its CFO,
12 its COO, its heads of global risk management, its senior
13 VPs, they're all involved, they all know that the financial
14 statements that have been incorporated into the PPM contain
15 materially false and misleading statements, and that as a
16 result the overarching financial picture of LBHI and its
17 potential ability to meet its future obligations when due is
18 less than what is set forth in the PPM. So the entity, LBI,
19 is aware of the falsity of LBHI's statements.

20 I'm not saying that it made them, it's aware of
21 them, and then it takes its army of brokers, the company,
22 sends them out as agents knowing full well that LBHI's
23 financial situation is other than has been represented and
24 says sell these.

25 And they go out, the dutiful army of brokers, they

1 don't know that Dick Fuld knows, O'Meara knows, Kalan (ph)
2 knows, Gregory knows, they all know. That's imputable to
3 LBI because LBI's highest level officers and directors know
4 and created the scheme.

5 So for them to then do this and then argue that
6 oh, gee, the brokers didn't happen to know because we didn't
7 tell them so therefore we can't be liable for sending these
8 people out and pretending that this is a good investment
9 when we've hidden the truth in the PPM. That's the problem.
10 That's fraud. The fraud is in connection with that
11 culpability and that knowledge of the falsity of the PPM
12 pursuant so which these securities were marketed and sold.

13 THE COURT: Okay. So --

14 MS. ALPERSTEIN: Does that make sense?

15 THE COURT: Well, I hear you. So let's talk about
16 Joe Broker.

17 MS. ALPERSTEIN: Okay.

18 THE COURT: Okay? Let's talk about Joe Broker.
19 Joe Broker makes a phone call to your clients and says, I've
20 got a great product for you, here it is. Okay? And your
21 client buys it. Okay? Joe Broker says, you know, read it
22 because there's risk. Okay? And it says it right here
23 there's risk.

24 MS. ALPERSTEIN: Uh-huh.

25 THE COURT: And the client buys it. Okay? And

1 the facts are -- this is the hypothetical -- that Joe Broker
2 never had a conversation with Dick Fuld, Joe Broker sits in
3 a cubicle, okay, he is completely unaware of anything that's
4 going on in the big picture, he's a broker. He's got
5 products --

6 MS. ALPERSTEIN: Uh-huh.

7 THE COURT: -- he picks up a phone, he calls them,
8 like any other broker he says, I've got something great for
9 you, buy it. Okay? You win?

10 MS. ALPERSTEIN: I think so, yes.

11 THE COURT: You win because -- simply because he
12 works -- it was in the -- this is your theory. He was
13 working as a Lehman broker, an LBI broker, Dick Fuld knew
14 and was the architect of the scheme, and therefore because
15 the LBI broker was acting in the course of his employment,
16 utterly without knowledge of anything, that therefore that
17 was a fraudulent transaction.

18 MS. ALPERSTEIN: Yes, and the reason for that,
19 Judge, is simply -- and as I think we put this in our papers
20 -- is if you were to rule otherwise you could have a
21 situation which would be the situation here where at the
22 highest, you know, echelons of the company.

23 THE COURT: Right.

24 MS. ALPERSTEIN: The company is orchestrating a
25 scheme. It deliberately withholds that scheme from --

1 THE COURT: Right.

2 MS. ALPERSTEIN: -- from its flunkies and they go
3 out and then --

4 THE COURT: Well let's not call them flunkies.

5 MS. ALPERSTEIN: Fair enough.

6 THE COURT: Okay?

7 MS. ALPERSTEIN: And I don't mean to do a
8 disservice or be disrespectful to the brokers. To the
9 people who are employed to do their jobs and place these
10 products. They don't know the truth. So they can go out
11 and say, gee, I didn't know. And there's a reason we didn't
12 sue -- we didn't seek to hold those individual brokers
13 accountable. They're simply agents.

14 The company knew what was going on and it had a
15 duty to either not place those fraudulent securities or to
16 tell the brokers, you know what, you've got to qualify what
17 you're saying. They also --

18 THE COURT: So how do you satisfy the scienter
19 requirement? Isn't there a scienter requirement?

20 MS. ALPERSTEIN: Of course there is, yes, Your
21 Honor.

22 THE COURT: Okay. So how do I satisfy the
23 scienter requirement? Because we have Joe Broker --

24 MS. ALPERSTEIN: Yes.

25 THE COURT: -- okay? He doesn't know. Okay?

1 There's no -- there is no scienter -- if he doesn't know
2 there's no scienter.

3 MS. ALPERSTEIN: He's simply the agent, he's a
4 mouthpiece for LBI, and LBI knows because of the acts of its
5 officers and directors that are imputable to LBI.

6 THE COURT: So Dick Fuld's scienter gets
7 attributed to the broker.

8 MS. ALPERSTEIN: That is not completely correct,
9 and that would no be accurate.

10 The scienter that is attributed to LBI is the
11 scienter that comes from the combination of all of those
12 high level corporate officers and directors who knew. That
13 put LBI on notice. Therefore you've got the corporate
14 scienter at the time that the company then directs its
15 brokers to hawk this product to unsuspecting customers.

16 The scienter comes at the higher levels, from the
17 people who undertook the underlying fraudulent conduct and
18 knew about it.

19 THE COURT: Well so -- okay. But let's go back to
20 what you actually allege. You say that the LBI brokers made
21 fraudulent sales pitches. So that's a fraudulent
22 misrepresentation. But you haven't said anything about
23 specifically what statements were made which could be
24 interpreted by your client as a guarantee of LBHI's
25 liquidity when the warrant matures against something that

1 says in the PPM you may never see anything.

2 MS. ALPERSTEIN: We are not alleging that the
3 brokers guaranteed that there would be an absolute ability
4 to pay. What we've alleged, and I think this is a critical
5 issue, Your Honor, is that the truth about the financial
6 condition and the ability to potentially pay was misstated.
7 There was no qualifier, there was nothing said to qualify,
8 for example, that what -- the representations in the PPM
9 about LBHI's financial strength were true or not true.

10 So, for example, it's obviously material to any
11 investor -- I don't know if that's me -- it's material --
12 the financial condition of a counterparty or of the person
13 issuing the warrant is going to be material to the investor.
14 We don't have -- we were not given a true picture of that
15 financial condition.

16 We're not saying that they were promised that no
17 matter what under any circumstance in the history of the
18 earth there is no possibility that LBHI could not pay its
19 debt, and I think -- when they came due -- and I think
20 that's an effort on the part of the trustee to reframe our
21 case.

22 THE COURT: So go back to your pleading if you
23 would and show me the allegation that LBI or their brokers
24 knew or believed that LBHI would not be able to pay on the
25 warrants.

1 MS. ALPERSTEIN: That's not what we're alleging so
2 I can't show you that because we don't allege that they said
3 they would absolutely be able to pay.

4 THE COURT: Okay. Well what do you allege?

5 MS. ALPERSTEIN: We allege the financial condition
6 of LBHI was misrepresented through omissions about the truth
7 of that condition, that its financial ability --

8 THE COURT: To pay.

9 MS. ALPERSTEIN: But we do not allege that there's
10 no ability to pay, just the elements that go into the
11 evaluation of the credit worthiness of that entity were
12 misstated.

13 THE COURT: Okay. Can you show me those
14 allegations?

15 MS. ALPERSTEIN: The specific allegations with
16 respect to the Repo 105 piece of it are at paragraphs 41
17 through 83. So they're pretty complicated.

18 The specific allegations with respect to the
19 omissions and misstatements regarding its liquidity levels
20 are at paragraphs 92 to 102.

21 The specific allegations regarding -- excuse me --
22 its risk management practices, which were misstated, are at
23 paragraphs 84 through 98.

24 The specific allegations concerning LBHI's
25 commercial real estate practices --

1 THE COURT: So this is the allegation, Dick Fuld
2 knew this, Dick Fuld knew it wearing an LBHI hat, he knew
3 about it wearing an LBI hat, notwithstanding any lack of
4 knowledge of all of this by the brokers who were selling the
5 securities --

6 MS. ALPERSTEIN: Correct.

7 THE COURT: -- you win.

8 MS. ALPERSTEIN: Yes, because the corporate
9 scienter of LBI when it sent its brokers out into the
10 workforce was already there from Fuld and O'Meara and --

11 THE COURT: Okay. And what's your authority for
12 that? What's your authority for that legal principal?

13 MS. ALPERSTEIN: First the general statement --
14 principal of agency, which we cite in our papers. That's
15 one.

16 The Janus case mentions that there's nothing --
17 there's nothing in it -- (indiscernible) I take that back --
18 but there's nothing in Janus, for example, that upends in
19 any way the traditional principals of agency pursuant to
20 which the --

21 THE COURT: But Janus says that a statement is not
22 attributable to a defendant, so here LBI, where the alleged
23 statement was not attributed to the defendant, here LBHI
24 issued the PPM, that's an undisputed fact, and two, the
25 defendant did not engage in any actions that made the

1 statement either necessary or inevitable.

2 So Janus involved the situation where the
3 statements made in an SEC filing by one Janus fund were not
4 attributable to another Janus fund.

5 MS. ALPERSTEIN: The difference there, however is
6 that our case what we have is the same exact people, the
7 same overlapping people, and so that knowledge -- we can't
8 say gee, Dick Fuld, gee, O'Meara, gee, Kalan, gee, Gregory,
9 let's take your hat off, you don't really know in your
10 capacity as the chairman of LBI what the truth is about
11 LBHI.

12 THE COURT: Well but were there -- right, but is
13 there any difference? I mean we could go back and look at
14 Janus. There were undoubtedly overlapping personnel in
15 Janus as well. That's the whole -- if the rule were simply
16 one person, two hats, whatever he says with respect to in
17 wearing one hat is attributable to the other hat life would
18 be a lot simpler, but that's not what the law is.

19 MS. ALPERSTEIN: But the issue in Janus was who's
20 the maker. The issue in Janus was not the scienter of the
21 defendant there. The question there was who's the maker?
22 Is the subsidiary -- was the funds advisory slash subsidiary
23 legitimately considered the maker of those statements?

24 What we're talking about here is LBI's knowledge
25 of the falsity of those statements that it then sent its

1 workers out into the world to then hawk. That's the
2 difference here. So you thought the corporate knowledge --

3 THE COURT: But they're hawking -- again, another
4 word I don't like -- they're selling these securities --

5 MS. ALPERSTEIN: Correct.

6 THE COURT: -- that say in no uncertain terms, you
7 could lose every penny you put into this. You could lose
8 every penny you put into this. That's what people wrote
9 checks to buy. They wrote checks to buy a security that
10 they were told in bold clear language in the prospectus, you
11 could lose every penny of your investment.

12 MS. ALPERSTEIN: And there's no asterisk
13 suggesting, and by the way, that is a very real risk because
14 we have lied --

15 THE COURT: But it says --

16 MS. ALPERSTEIN: -- and our parent has lied about
17 the truth.

18 THE COURT: -- it doesn't -- but it says an
19 investment in the warrants involves substantial risk,
20 including the risk that investors may lose the entire value
21 of their investments in certain circumstances. And the
22 cases are lesion that say that when there's a sales pitch,
23 as there was here undoubtedly, and there's clear language
24 that informs the investor of the risk, the clear language
25 trumps the sale pitch.

1 MS. ALPERSTEIN: No, I would argue and I do argue
2 that that risk factor is itself materially false and
3 misleading. If I could use a hypothetical to explain this,
4 Judge.

5 Let's hypothesize that at the time of this risk
6 factor in fact Mr. Fuld and Mr. O'Meara knew that the
7 company was in the zone of insolvency. I don't think that
8 any court would conclude that this risk factor would absolve
9 them, because they have knowingly -- they would have
10 knowingly hidden the fact that the company was technically
11 bankruptcy. Well say gee, too bad we warned you -- we
12 warned you that me might not be able to play.

13 THE COURT: Okay. So let's talk about scienter,
14 okay? Because we bring Dick Fuld in here --

15 MS. ALPERSTEIN: Uh-huh.

16 THE COURT: -- and put him in the box, okay? And
17 you say to him, it's Friday, September 12th, okay? He would
18 say we're going get bailed out. He would say the company
19 actually isn't insolvent. He wouldn't agree with you.

20 We now have the benefit of hindsight because
21 everybody remembers where they were that weekend, and
22 everybody was shocked that the company didn't get bailed
23 out.

24 There is a fairly good argument that in fact LBHI
25 wasn't insolvent but it became insolvent because it had to

1 as in when it filed.

2 So if we -- if this were to go to trial, okay,
3 there would be an issue on the point of scienter, because
4 folks would come in and say, absolutely not, LBHI wasn't
5 insolvent. Were we having problems? Yes. Was our
6 commercial paper not rolling? Yes. But we believed we were
7 going to get acquired. We believed X, Y, and Z.

8 So it can't be taken as a given now, because now
9 we now what we know, that's a hindsight kind of approach --

10 MS. ALPERSTEIN: And that's --

11 THE COURT: -- and that's not the way it works.

12 MS. ALPERSTEIN: And I understand that, Judge, and
13 I offer that as a hypothetical to attempt to illustrate that
14 the risk factor can't be an all absolving safe harbor to
15 simply -- for -- and I'm not saying this is what they said,
16 but for a company to say -- knowing -- and I'm not saying
17 that they knew this -- but for a company to say knowing that
18 they are functionally bankruptcy, by the way, a risk factor
19 is that we might at some point not be able to pay your debts
20 when due, that would be a false and misleading risk factor
21 because it -- and the reason it would be false and
22 misleading would be because the company knew facts that it
23 wasn't some theoretical generic risk that let's face it,
24 every company in the world faces the risk that they might at
25 some point not be able to meet their debts when due. And so

1 when a company knows facts that make that risk not just
2 theoretical or generic and applicable to everyone, but
3 actually a real risk that there is some sort of risk, then
4 that's not going to be a fair risk factor, it's not
5 accurately presented, it's misleading and presented.

6 And what our argument here is, and I think it's
7 important to clarify this, our argument isn't that they
8 should have disclosed that they were functionally
9 bankruptcy. We don't think that they thought that and we're
10 not saying that. What we're saying is that that risk factor
11 and the disclosures are all misleading because they don't
12 allow the investor --

13 THE COURT: But that's the claim against LBHI.
14 LBHI made the statements, not LBI.

15 MS. ALPERSTEIN: If I could finish the point and
16 then I will address that one, Judge.

17 The point that we're making is that the investor
18 is looking to make a decision about whether or not to
19 invest. One of the material items that the investor
20 considers is the ability of the counterparty to pay, and in
21 order to assess that they need to have accurate and not
22 misleading information about the financial condition of the
23 company. When the company withholds that materially --
24 misstates it through accounting fraud and false filings,
25 that's a problem.

1 I understand that LBHI is the entity that made
2 those false statements in the context of its SEC filings.
3 Those were incorporated by reference into the PPM. The PPM
4 -- LBI however was the placement agent for the PPM. LBI's
5 highest level of officers and directors, we've gone through
6 them, knew about those false and misleading statements,
7 because they're the ones who made them. They're the one who
8 made them. They're the ones who perpetrated the scheme
9 that's been detailed by the examiner and in other
10 litigations. Dick Fuld knew, O'Meara knew, they all knew,
11 and that's imputable to LBI.

12 THE COURT: Okay. So, I'm going to ask you to
13 take a -- I'm going to ask you to pause for a moment and
14 take a seat, all right?

15 So let's talk about -- I'm going to go back to the
16 trustee. Let's talk about this issue that seems to be at
17 the crux of this matter, which is the, you know, Repo 105,
18 it was a fraud at LBHI, Dick Fuld knew, Dick Fuld has an LBI
19 hat right next to his LBHI hat, and that every single broker
20 in every single cubicle can be deemed or should be deemed
21 under the law to be -- have acted with the same -- with a
22 level of knowledge and a scienter as if it were Dick Fuld
23 himself selling the securities. Because that seems to me to
24 be the crux of this entire argument, that it doesn't matter
25 that the broker -- Joe Broker in the cubicle had no

1 knowledge of that, he in good faith was selling this product
2 that had been, you know, in his daily box, here's products
3 you should sale, and he in good faith went out and sold it.

4 And what the plaintiff -- what the claimants are
5 saying is that doesn't matter, he could be as pure as the
6 driven snow, he worked for Dick Fuld, Dick Fuld knew, he
7 wore an LBI hat, he knew this in the LBHI side of his brain,
8 it's attributable, it doesn't matter that the risk factor
9 says there's a lot of risk because at the moment that the
10 phone call was made by Joe Broker Dick Fuld knew that the
11 whole thing was a fraud. I think that's the claim.

12 So tell me why that's not a winner?

13 MR. MITCHELL: Okay, Your Honor, thank you.

14 So as Your Honor has I think correctly pointed out
15 and the trustee would agree, you keep using the word
16 hindsight. I think that's part of the issue here that
17 should be looked at.

18 Because also before I launch into the specific
19 answer, the nature of the security itself is important to
20 think about. These are high risk securities sold at a
21 specific date valued by LBHI to be held to maturity. So the
22 idea is these things are going to be valued in accordance
23 with the promise of an underlying fund.

24 THE COURT: Right.

25 MR. MITCHELL: There's a date over here where

1 something is going to happen. We're going to calculate. If
2 it goes one way you win, you get paid. If it goes the other
3 way you don't. Oh, by the way here's a PPM, there's a whole
4 bunch of other ways in which you can lose all your money,
5 and not only does it say in those bold letters that they --
6 you know, just written large, you could lose everything,
7 there's very specific places in the PPM that says if LBHI
8 should be in bankruptcy proceedings at maturity you could
9 lose everything. There's not -- at best --

10 THE COURT: Right. But counsel would say that's
11 fine --

12 MR. MITCHELL: That's fine.

13 THE COURT: -- that's a standard risk factor, but
14 Dick Fuld knew that the house of cards was about to
15 collapse, and notwithstanding that the brokers were out
16 selling these securities.

17 So the risk factor looks good --

18 MR. MITCHELL: Uh-huh.

19 THE COURT: -- but in fact the risk factor should
20 have said oh, by the way, we're engaging in a massive fraud
21 and you should buy these securities any way. That's what it
22 -- in counsel's view that's what an accurate risk factor
23 would have said.

24 MR. MITCHELL: If it were a fraud, and I mean
25 that's the point. If these -- and the claimants keep using

1 the word scheme with reference to these securities. Yet
2 they haven't pled anything to show that the securities
3 themselves were in some way fraudulent, and that's how it
4 must -- it has to be narrowed.

5 Now the Court is correct --

6 THE COURT: No, I don't think she's -- she's not
7 saying that the securities were fraudulent, she's saying
8 that the fraud was LBI takes a PPM from LBHI.

9 MR. MITCHELL: Uh-huh.

10 THE COURT: LBHI at that moment in time knows it's
11 engaging in fraud. LBI knows because you attribute the
12 knowledge of the officers across the great divide from LBHI
13 to LBI, then you attribute that knowledge down to the
14 brokers. So the fraud is selling securities knowing that
15 LBHI was not in good shape.

16 MR. MITCHELL: Well that's the difference, and
17 that's the fundamental difference in the way this argument
18 works. It's not enough for a claimant to come and say, well
19 you knew that things weren't as -- you know, they were going
20 to say as losey (sic).

21 THE COURT: Right.

22 MR. MITCHELL: A matter is you knew these were
23 fraudulent, that's why we have to tie it back to the
24 securities. You knew LBHI couldn't pay. That would be a
25 basis for fraud.

1 THE COURT: That's what they're alleging.

2 MR. MITCHELL: There's a couple --

3 THE COURT: They're saying -- that's what they're
4 saying. They're saying that you knew --

5 MR. MITCHELL: That LBHI knew that --

6 THE COURT: Yes.

7 MR. MITCHELL: -- and by extension.

8 THE COURT: But that's what they're saying.

9 They're saying Dick Fuld knew that --

10 MR. MITCHELL: And the only way that -- I'm sorry.

11 I'm sorry, Your Honor, go ahead.

12 THE COURT: Go ahead. That Dick Fuld knew that
13 LBHI would not be able to pay.

14 MR. MITCHELL: And the only -- and the basis upon
15 which they hang that is the fact of the LBHI bankruptcy. As
16 the Court said, fraud by hindsight does not work. That's a
17 Second Circuit standard, it's been codified in the PSLRA.
18 You can't look and say, well because you went bankrupt, you
19 knew you were going to go bankrupt, therefore you should
20 have told us. And that's also something that's in the case
21 of Rombach v. Chang (ph) which the trustee cites, almost a
22 very similar complaint by individuals that held securities
23 and they alleged that the entity that sold them securities,
24 well, you know, you told us that you were optimistic, and
25 you told us that things were going to go a lot better, turns

1 out things didn't go well and the entity went bankrupt, and
2 they came back and said, well look, you lied to us, you
3 didn't tell us the truth about the circumstance. And the
4 court said:

5 "People in charge of an enterprise are not
6 required to take a gloomy, fearful, or defeatist view
7 of the future, they can be expected to be confident
8 about their stewardship and prospects of the business
9 that they manage."

10 And that's I believe what the Court was getting at
11 with bringing Dick Fuld in, but the Lehman Brothers
12 bankruptcy was not a foregone conclusion at the moment the
13 warrants were sold to the claimants. That's really what it
14 turns on. And so that's why the PPMs become an issue,
15 that's why the risk factors become an issue, that's why the
16 nature of the securities and sales become an issue.

17 Not only that, but under the Telabs' (ph)
18 framework, this is the fraud by hindsight protection, if
19 there's going to be an inference of fraud from certain facts
20 pled, and the trustee would argue there have not been facts
21 pled to show that Dick Fuld knew or that anyone at LBI knew
22 or believed or thought that at the time the warrants were
23 sold several months prior to the bankruptcy that LBHI
24 wouldn't be around.

25 But given the facts as they are pled, taking into

1 account the PPMs, taking into account the fact that LBHI
2 stepped up and said, yeah, we sold these things, they were
3 legitimate, there was no lie about the underlying
4 calculations, there was no lie about the existence at the
5 hedge fund against which these things would be valued.
6 Taking all those facts according to Telabs, if there's going
7 to be an inference of fraud it must be at least as
8 compelling as any counter-inference. Well the counter-
9 inference that speaks large here, and I think as the Court
10 is speaking to is, this was business as usual. LBHI is in
11 the business of selling securities, they're in the business
12 of selling risky securities.

13 THE COURT: LBI is.

14 MR. MITCHELL: I'm sorry, yeah, LBI. Well LBHI is
15 in the business of structuring these things.

16 THE COURT: Right.

17 MR. MITCHELL: And putting these things together.
18 This was business as usual. No one was walking around in
19 the months before the bankruptcy saying, gee, we're not
20 going to be around, what can we cobble together, what
21 scheme, to use the word of the claimants, can we put
22 together to fleece as many people as possible? There's no
23 facts that they've pled to show that. The facts --

24 THE COURT: Well they plead everything from the
25 examiner's report.

1 MR. MITCHELL: The -- yeah, the Repo 105.

2 THE COURT: The Repo 105.

3 MR. MITCHELL: And the use of that.

4 THE COURT: Right.

5 MR. MITCHELL: But does that speak to the idea
6 that at a certain point in time -- as the Court noted did
7 anybody at LBHI think we're not going to be around to pay on
8 these securities?

9 Now with respect to the use of the examiner's
10 report and the third amended complaint and things like that
11 those had relevance, and Judge Kaplan looked at those in
12 connection with very different securities under a very
13 different framework. Those were not like the securities
14 here. Again, bought to be held, not traded on an open
15 market, not purchased on an open market, the price of which
16 was not affected by movement of an open market. Specific
17 price set by LBHI. You want in, you hold these things to
18 maturity. If you want to try to sell these things you have
19 to do it in accordance with very specific rules. If you
20 don't follow those rules we won't recognize that sale. I
21 mean these things were very highly restricted.

22 For the claimants to come in and say, well, the
23 PPMs don't really matter, even though the risk factor
24 they're complaining of actually materialized and they were
25 put on notice of it, would seem to get the entire point of

1 having, as you say, the voluminous case law that says if
2 somebody tells you one thing and then hands you a PPM that
3 says the other thing that would be -- that would fly in the
4 face of all that case law.

5 The claimants look to and in their own statement
6 it was the ability to potentially pay that was the issue,
7 and there was no qualifier.

8 The trustee says first of all potentially paid is
9 not the question. That doesn't raise to the level of fraud.
10 And the qualifier is absolutely there in the form of the
11 PPMs. The claimants were put on absolute notice.

12 And, you know, with respect to --

13 THE COURT: What about the scienter point? What
14 about the brokers work for Dick Fuld, Dick Fuld knew all
15 about this, therefore you attribute under ordinary agency
16 principals Dick Fuld's scienter to satisfy the scienter
17 requirement of the innocent broker who was just selling
18 whatever was in his inbox that day?

19 MR. MITCHELL: Right. Your Honor, that doesn't
20 follow -- I mean if that's the claim the claim would be
21 against Dick Fuld. Dick Fuld is the one that apparently has
22 that knowledge.

23 THE COURT: No, but the plaintiff is saying that
24 the brokers worked for Dick Fuld --

25 MR. MITCHELL: Uh-huh.

1 THE COURT: -- it would create another scheme, it
2 would enable defendants to escape liability by having the
3 guys at the top come up with a scheme, think it's a really
4 good scheme, it's super fraudulent, and then they just don't
5 tell the folks in the trenches who are then designed to
6 perpetrate the scheme. So it's a perfect defense, because
7 all you have to do is not tell anyone about all this fraud
8 and have them innocently go out and sell the securities and
9 then this is the greatest thing ever. So that's what
10 counsel is saying why that doesn't work.

11 So ordinary agency principals, the brokers were
12 working in the ordinary course of their employment, and
13 therefore it doesn't matter what they subjectively did or
14 did not --

15 MR. MITCHELL: Uh-huh.

16 THE COURT: -- do, you attribute Dick Fuld's
17 scienter, assuming it existed, to Joe Broker.

18 MR. MITCHELL: So the reason -- thank you, Your
19 Honor.

20 The reason why that does not work is including
21 what you said, the attribution problem. You've got
22 attribution from somebody at LBHI, LBHI -- actually this is
23 where the Janus comes into play too as well. It's exactly
24 that. The focus of the Janus case was two -- or maybe I'll
25 just say one policy issue overriding, which is the private

1 right of action provided by securities laws must be narrowed
2 specifically to what we have in front of us. And the way in
3 which the court got to that was this necessary or inevitable
4 framework, which was the entity. And what they looked at
5 was which was the entity that did something that made these
6 alleged misstatements necessary or inevitable?

7 Now as the Court noted in that circumstance you
8 have a parent that created a mutual fund that issued
9 securities and filed statements with the SEC wherein the
10 statements were complained of, plaintiffs coming in and
11 saying, wait, this other entity is the one that needs to be
12 held accountable. And the court said, no, no, no, very
13 clearly this entity, they issued, they filed with the SEC,
14 nothing is attributed to any of these folks over here, we
15 have to narrow this.

16 The same circumstance is at play here. The
17 statements that are being complained of are the LBHI SEC
18 filings in connection with the securities issued by LBHI.
19 The actions -- to imply the necessary or inevitable
20 framework from Janus is to say who engaged in any practice
21 here that made these alleged misstatements necessary or
22 inevitable? It was LBHI.

23 If that's the way it's going to follow, if it's
24 all the practices that are being complained of in the
25 complaint those are LBHI practices. It's first and last a

1 question of LBHI. The Janus framework again does not
2 magically transform those into the actions of LBI.

3 The narrowing framework is very specific and very
4 clear, nope, if it's not attributed that way, if it's not
5 that person that did something that made these statements
6 necessary and inevitable you cannot attribute that statement
7 or by extension that scienter or anything the that entity,
8 it's this entity.

9 THE COURT: But here I think they're saying --
10 because in Janus it was the same people, right?

11 MR. MITCHELL: Uh-huh.

12 THE COURT: But here what they're saying that it's
13 the same people and they actually knew. They actually were
14 the architects of the scheme that caused the brokers to sell
15 these securities. So that it's not really about
16 attribution, it's about actual knowledge and actual
17 scienter, and the attribution is not between LBHI and LBI,
18 you get over that fact by the fact that -- or they get past
19 that by the fact that Dick Fuld wore the two hats, and then
20 you have to attribute down to the brokers, which they say is
21 not a securities law thing, it's an ordinary agency thing
22 that the employee is carrying out the business of the
23 employer, and therefore LBI is liable and the subjective
24 intentions or statements of the broker don't matter. That's
25 what I think that they're saying.

1 So doesn't that go beyond Janus, what Janus said?

2 MR. MITCHELL: I still think we're back in the
3 attribution wheelhouse to a certain extent, and I do think
4 there's two issues at play as the Court noted, right?

5 You've got the statements in the PPMs, you've gotten all
6 this -- I guess in connection with that the way in which
7 this scheme -- so-called scheme is concocted and they're
8 selling it, and then you've got the actions of LBHI. At
9 some point there's some bleed over into that.

10 If its securities originated sold by and the basis
11 of the complaint is the actions of LBHI, again, that's all
12 LBHI (indiscernible), that's the attribution problem.

13 If it's this other matter again we come back to
14 the nature of these securities. What was known? We don't
15 see any pleading in here. We understand what the claimants
16 are saying, but the claimants' claim all tends and seems to
17 be rooted in that notion of fraud by hindsight. Well LBHI
18 went bankrupt. You should have known many months ago that
19 that was the case. You should have told us. Well Rombach
20 v. Chang says something very different. It says, you don't
21 have to.

22 And the actions of the individual brokers, if the
23 individual brokers are, you know, they're getting their --
24 like you say their marching orders for the day, we have
25 these new securities, oh, fantastic, let's go sell these

1 things, and if there's no facts to show that the people up
2 top are concocting a scheme but they are constructing
3 securities as they normally do in the normal course of
4 business we say, hey, here we think this security is a good
5 thing, it's going to allow our investors to benefit from the
6 performance of another fund that they may not be able to
7 invest in, let's put these together and offer these two and
8 be sure we give them all of the necessary warnings because
9 they're real. That's the facts.

10 And that gets back to the Telabs' factor. We keep
11 coming back to the same thing. The counter-inference from
12 all the facts as they have been pled.

13 The fact of the bankruptcy cannot be relied upon
14 as a basis for determining knowledge and intent, scienter,
15 back when the securities were filed. It has to be measured
16 from that point.

17 And as the Court noted, then it's -- you know, to
18 bring Dick Fuld in and he's going to argue that right up
19 until the last second, no, we thought we were going to be
20 fine. And --

21 THE COURT: So if I -- so let's focus on that
22 though, because if I expunge the claims, which is tantamount
23 to a 12(b)(6) dismissal, right, then isn't that kind of
24 facty -- F-A-C-T-Y -- facty on my part? In other words
25 could I be accused of having made on a motion to dismiss a

1 factual determination? Because what you have and are
2 talking about now is a characterization of what the
3 situation was like prior to September 15th, 2008. We've had
4 this exchange, both of us about, you know, my view --

5 MR. MITCHELL: Uh-huh.

6 THE COURT: -- that the world was more complicated
7 than what the plaintiffs have alleged. But aren't they
8 entitled to take a shot at establishing that in fact the
9 facts are as they say they were and that Dick Fuld -- and
10 obviously we're using the gentleman as a shorthand for, you
11 know, LBI management, et cetera.

12 So, I'm just beginning to be concerned that I not
13 be resolving factual issues just because we quote/unquote
14 know them, right? I mean I think -- so that's a little bit
15 of a problem that I'm having.

16 The other problem that I'm having, which is more
17 directed at counsel for claimants, is that there is
18 absolutely overwhelming body of case law that you just
19 eluded to that says when you get a prospectus that very
20 clearly says, you know, the sun sets in the east and the
21 broker tells you no, no, no, the sun sets in the west -- I
22 probably have those reversed to make it meaningful -- when
23 the broker's statements directly contradict what's in the
24 prospectus the prospectus wins, and that doesn't turn on
25 whether or not there was a fraud.

1 MR. MITCHELL: Uh-huh.

2 THE COURT: So that's kind of the other side of
3 the coin for me.

4 MR. MITCHELL: Understood, Your Honor, and if I
5 may just to that point.

6 THE COURT: To -- yeah.

7 MR. MITCHELL: It's really -- from a legal
8 standpoint it's the question of plausibility.

9 THE COURT: Plausibility.

10 MR. MITCHELL: Plausibility versus possibility.

11 THE COURT: Right.

12 MR. MITCHELL: It's not enough to justify
13 discovery, and that's why the securities fraud standard is
14 so high, and that's why there's no claim of fraud by
15 hindsight, that's why we have Telabs to say insure that
16 there is not a counter-influence here that is more plausible
17 than fraud.

18 Because to go into this type of discovery is
19 expensive, it's costly, and unless there's a legitimate
20 reason, a plausible reason to think that if you go into
21 discovery you're going find that statement, that email, that
22 fact that says, hey, you know what, we're lying about all
23 those securities starting this date forward --

24 THE COURT: Well if the government had bailed out
25 Lehman the warrants would be in the money, right?

1 MR. MITCHELL: They would have been in the money.
2 They would have had it, and so that's the thing. It has to
3 be dated -- that scienter has to be dated --

4 THE COURT: Right.

5 MR. MITCHELL: -- from the date the warrants were
6 sold.

7 In connection with that, so that's why I say it's
8 plausible. The facts as pled at this point in order to be
9 dismissed have to push it over the line. Given all the
10 facts as being pled it's just not plausible. More plausible
11 is the counter-inference which again this is business as
12 usual, these are securities, they're risky, they're sold to
13 people to be held to maturity, everybody thinks it should be
14 fine, but here's risk factors, be on notice.

15 If I may too, Your Honor, I think Your Honor got
16 to this if I could just --

17 THE COURT: LBHI stock was also trading at 20 odd
18 cents even after the filing, just as a random fact. We're
19 talking about solvency.

20 Okay. Keep going.

21 MR. MITCHELL: All right. Thank you, Your Honor.

22 The other issue here -- the other issue which the
23 Court eluded to in January 22nd hearing, if I may. The
24 Court posed a question to the claimants, and the trustee
25 agrees with your underlying concern here. The Court said:

1 "So my question to you is if your construct in
2 fact works then everybody -- everybody who had LBI as
3 their broker and who bought LBHI securities during a
4 certain time frame ..." --undefined, and that's my
5 editorialization there.

6 THE COURT: Right.

7 MR. MITCHELL: When as you put it, "The
8 shenanigans." Here they're referred to as the excuse me.
9 We're going on, "Then they've got in your view a valid
10 creditor claim against LBI for securities fraud."

11 The trustee would -- agrees with the underlying
12 concern and would even say, well, is it conceivable that it
13 doesn't necessarily even stop with securities fraud? If
14 it's going to be pegged back in time at a certain point how
15 do we peg that, what is the fact to say here's the time?
16 And then doesn't any agreement then have a right to a fraud
17 claim under the -- a right to a fraud claim gets created,
18 particularly in this circumstance, where as the Court has
19 noted, clear warning has been given. There's just been no
20 facts to push the claim over the plausibility line. To do
21 so would undo the -- would indicate there is the potential
22 for attribution.

23 There's many, many things here at play that
24 there's just not been enough pled, and there's frankly just
25 not enough given the existence of the PPMs, given the way

1 these claims have gone forward, there's just not enough to
2 push it over the line of plausibility.

3 THE COURT: Okay.

4 MR. MITCHELL: And that's the legal framework in
5 which this Court would be fully justified in --

6 THE COURT: Okay.

7 MR. MITCHELL: -- expunging these claims.

8 THE COURT: All right. Thank you.

9 MR. MITCHELL: All right. Thank you.

10 THE COURT: All right. What else from you folks?

11 MS. ALPERSTEIN: Could I respond, Your Honor?

12 THE COURT: Sure.

13 MS. ALPERSTEIN: Thank you.

14 First I'd like to address this notion that we are
15 attempting to plead fraud hindsight, because it's just not
16 true. Our allegation is not, it's simply not that at the
17 time of the PPM and at the time that the brokers solicited
18 the claimants that Fuld and others knew for a certainty that
19 the company would go bankrupt and would not be able to meet
20 its obligations when due.

21 The crux of our claims is that the financial
22 condition was not accurately represented. The financial
23 condition --

24 THE COURT: But it wouldn't -- if the government
25 had bailed out Lehman these securities would have paid.

1 So the issue was whether -- so even if there was a
2 fraud the -- so there -- assume there's a fraud and Dick
3 Fuld knows there's a Fuld, but he's going to convince the
4 government to bail out Lehman, there's nothing fraudulent
5 about these statements, because if in fact the government
6 bailed out Lehman insolvency wouldn't have occurred, it's
7 the bankruptcy that caused the warrants not to be paid, you
8 wouldn't be standing here. So --

9 MS. ALPERSTEIN: I think there would still be a
10 fraud. The question of damages would be obviated.

11 THE COURT: Well there would --

12 MS. ALPERSTEIN: But the fraudulent statements
13 would still have been fraudulent.

14 THE COURT: But your claim here is because the
15 warrants didn't -- you didn't get paid. The warrants didn't
16 deliver. That's the claim. The warrants didn't deliver.
17 And what you're saying is that the securities were sold
18 against the backdrop of knowing that there was financial
19 trouble. Right.

20 MS. ALPERSTEIN: Trouble, not necessarily
21 bankruptcy, but --

22 THE COURT: Right. But --

23 MS. ALPERSTEIN: -- a false financial picture was
24 painted.

25 THE COURT: Right. But the problem -- the problem

1 that you have and it wears two different hats, it's a
2 plausibility problem and it's also an attribution problem.

3 The plausibility problem is that it's easy to look
4 at an examiner's report and say, look, look at the
5 examiner's report. Right? Obviously there was this, that,
6 and the other thing going on, but that very much is a
7 hindsight view.

8 Secondly, there is the issue that many, many
9 people didn't think Lehman was going file, they thought
10 Lehman was going to survive, in which case these warrants
11 would have been good.

12 So if you bring Fuld in here and you put him on
13 the witness stand he and a parade of other people will say,
14 we thought we had a deal over that weekend.

15 I mean the -- you know, it sounds like a factual
16 determination, but I think that there's ample basis for the
17 observation that many people would say that.

18 Then you have a Janus problem. In Janus they were
19 the exact same people. They were the exact same officers
20 and directors, and the Supreme Court said, no attribution.

21 MS. ALPERSTEIN: But the Supreme Court said you're
22 not the maker of those statements. What they didn't have in
23 Janus, there was not a question of whether the -- whether
24 the company, the subsidiary had scienter, that is not what
25 Janus turned on, it turned on who was responsible for making

1 those false statements?

2 In our situation the attribution question is
3 whether or not corporate scienter can be imputed to the
4 company.

5 THE COURT: Right. And at the time -- so again,
6 so in your framework Dick Fuld and Joe Broker are
7 indistinguishable, so the scienter of Dick Fuld is I'm
8 selling securities that I know are not going to pay. That
9 wasn't his mindset at the time. His mindset at the time he
10 sold the securities, which is what your asking me to
11 envision, is that everything is going to be fine because
12 we're going get bailed out, there's going to be a
13 transaction.

14 His scienter, the scienter involved with selling
15 securities that you know not to be good securities, that
16 doesn't exist. Did he know? You say he knew that he was
17 engaging in accounting hocus pocus. Maybe he did, maybe he
18 didn't, but his scienter in selling the securities was at
19 that moment in time everything is going to be fine. It's
20 the opposite of -- it's the opposite. He thought everything
21 was going to be fine.

22 MS. ALPERSTEIN: Well, I think that we've pled it
23 pretty clearly that Fuld and the others knew that their
24 public filings that were describing the financial condition
25 of LBHI were false. They had a whole host of schemes that

1 they engaged in, misstatements and omissions regarding the
2 liquidity, regarding the risk management practices, you
3 know, artificially inflating their level of assets and
4 deflating their actual liabilities, creating a false picture
5 of the risk profile of the company and its eventual ability
6 to pay. It's that false picture. No guarantee of what's
7 going to happen in the future, but what the claimants and
8 others in the market were entitled to was an accurate
9 financial picture. That picture was known by Fuld and
10 everyone else at the highest levels of LBI to be false.

11 The reason it was known, and the issue isn't
12 really attribution, Judge, it's the knowledge of the falsity
13 of that PPM. And they had that knowledge. We've pled that
14 with extreme particularity. We've pled their roles in the
15 accounting fraud. We've pled what they knew. We've pled
16 statements that they made to the press, that they made to
17 the SEC, that were incorporated into the PPM and showed that
18 at the time those statements about the Repo 105, about the
19 concentration levels, about the liquidity risk were just not
20 true, and therefore the assets were inflated, the
21 liabilities were understated, and the financial picture of
22 LBHI was falsely presented.

23 I'm not saying and I can't in consciousness state
24 that he believed 100 percent that the company was going to
25 go down, and that's not what we've pled. But what our --

1 what the claimants had a right to know and didn't get was a
2 true picture of the real financial health of the company so
3 that they could make a reasonable investment or a
4 determination of whether to invest, and that was taken from
5 them. We don't need to show that bankruptcy was known.

6 THE COURT: So where -- so go back to the question
7 that I posed before, which is that therefore everyone after
8 a certain date who from LBI bought an LBHI security gets to
9 be in your shoes, right?

10 MS. ALPERSTEIN: Well they've got a statute of
11 limitations issue among other things --

12 THE COURT: Well forget about that. But what
13 other claims are out there like yours?

14 MS. ALPERSTEIN: I have no idea, Judge. Perhaps
15 one of my colleagues knows.

16 THE COURT: What other claims are out there like
17 yours? If you -- what other claims have legs like this
18 claim?

19 MR. SALOMON: Good morning, Judge. Chester
20 Salomon. If I may answer?

21 THE COURT: Yes. It's very disconcerting to have
22 to have a conversation with two people, and I would ask you
23 in the future that you have one person speak for you. But
24 go ahead.

25 MS. ALPERSTEIN: I apologize.

1 THE COURT: I know you said that at the outset,
2 but it's very difficult. Go ahead.

3 MR. SALOMON: I'm sorry, Judge.

4 THE COURT: Go ahead.

5 MR. SALOMON: I wanted to try to answer your
6 question. The question -- I've raised that question with
7 counsel over the years since we filed --

8 THE COURT: This counsel?

9 MR. SALOMON: That's correct.

10 THE COURT: LBI counsel?

11 MR. SALOMON: About how many other people are in
12 the same position as our clients who had unresolved claims,
13 claims that have not already been disposed of by this Court.
14 And the impression I have is that there are few, if any,
15 that remain. But counsel perhaps --

16 THE COURT: No, but I'm -- but that takes me in
17 the other direction. In other words there are so many
18 people who could have -- who might have been in the zone
19 where they bought LBHI products and could say that LBI sold
20 me this bad product, and yet I don't have something
21 elsewhere you can say that this claim was made and it
22 survived a motion to dismiss. I -- so that cuts the other
23 way.

24 In other words not to diminish, you know, the
25 abilities of you folks to craft a good complaint, but there

1 aren't a host of class actions out there by people who are
2 similarly situated to your people. I'm just -- I'm
3 struggling to find the framework for this. And so that
4 doesn't really advance the ball.

5 MS. ALPERSTEIN: Judge, if I may, I guess I'm not
6 entirely sure why the existence of other potential claimants
7 would affect the sufficiency of our complaint.

8 THE COURT: It doesn't affect the sufficiency of
9 your complaint, but I'm very big on context and very big on
10 following the lead of others who have, you know,
11 thoughtfully considered things before. So if there were a
12 claim out there that had survived a motion to dismiss and
13 was -- and had legs that just would be something that I'm
14 interested in. It doesn't -- it's not dispositive one way
15 or the other.

16 MS. ALPERSTEIN: Well, thank you.

17 If I could just address a couple other issues --

18 THE COURT: Okay.

19 MS. ALPERSTEIN: -- that counsel raised.

20 He mentioned that we're -- he seems to think we're
21 taking the position that the PPMs don't matter, and that's
22 not our position. Our position is that the PPMs do matter,
23 because what was said in them -- what was stated in them was
24 false.

25 THE COURT: What was said in them was you could

1 lose your entire investment. There's no greater statement
2 and clearer statement of risk. You're about to write a
3 check for a security and you could lose your entire
4 investment.

5 MS. ALPERSTEIN: That doesn't give -- the generic
6 risk factor that you could lose --

7 THE COURT: It's not --

8 MS. ALPERSTEIN: -- doesn't give the right to just
9 lie about what the actual risk profile is, and that's what
10 happened. They don't just get to say, by the way, if it
11 turns out that we can't pay our bills then you're going to
12 lose everything, and that's a given. But they don't get to
13 do that and say, by the way, our ability to pay in the
14 future is compromised because we haven't given you a
15 positive actual factual presentation of what or likelihood
16 is of the ability to pay in the future.

17 It's like a -- it gets to -- so if they commit
18 fraud it's too bad because they were warned and they might
19 lose their shirt? That's not how securities laws work.
20 They didn't -- it's not like a get out of jail free card
21 that they get to lie with imputity (sic) because they warned
22 that they might be able to -- they might not be able to pay
23 in the future.

24 And the risk factor itself is false and misleading
25 because it's omits the truth, it doesn't have an asterisk

1 saying, and by the way, this is a real potential risk
2 because we are massively understated our ability to pay in
3 the future, we haven't indicated to you what our real
4 financial strengths are.

5 THE COURT: But that's all something that you
6 allege, because now, with the benefit of hindsight, there's
7 an examiner's report.

8 MS. ALPERSTEIN: But the fact that the examiner's
9 report is out there detailing the elements of the fraud
10 doesn't make it fraud by hindsight, Judge. What the
11 examiner's report goes through is the details of that
12 scheme, the accounting fraud that they engaged in. It's --

13 THE COURT: You understand that the examiner's
14 report is just an examiner's report, it's not --

15 MS. ALPERSTEIN: I understand it's not proof. I
16 understand --

17 THE COURT: It's not proof of anything.

18 MS. ALPERSTEIN: I understand that, but we have
19 alleged with specificity, the same specificity as in that
20 report to support our allegations that what's set forth in
21 that PPM is not correct.

22 THE COURT: Well what about the fact that you've
23 alleged nothing about what any particular broker said to any
24 particular person? Hi, client, this is Joe Broker, just as
25 I always do I'm calling you today to tell you what today's

1 new Lehman securities are. Here's one, it's for warrants,
2 I'll send you the PPM. Have a nice day. Okay?

3 MS. ALPERSTEIN: Uh-huh.

4 THE COURT: Doesn't puff it, doesn't say anything,
5 just says, here it is. You win?

6 MS. ALPERSTEIN: Well that's not what we allege.
7 We do allege that it was puffed. We do allege the specific
8 conversations.

9 THE COURT: Okay. But that -- so okay. So you
10 haven't alleged what any -- you haven't alleged specifically
11 Joe Broker said this, that, or the other to this client.
12 You haven't alleged any of that.

13 MS. ALPERSTEIN: We've alleged that they said that
14 it was a good investment opportunity or an excellent
15 opportunity --

16 THE COURT: Do you have the names of the brokers?

17 MS. ALPERSTEIN: Yes, we do. We do, Judge.

18 THE COURT: Where's that?

19 MS. ALPERSTEIN: That is at paragraphs -- I
20 believe it starts at paragraph 31. Let me check.

21 UNIDENTIFIED SPEAKER: Page 11.

22 THE COURT: Paragraph 31?

23 MS. ALPERSTEIN: Oh, yes. Paragraph 31 identifies
24 the registered representative brokers as Robert Holland and
25 Sofia Frankle (ph), and then paragraph 33 discusses what

1 they were told as is paragraph 34. So paragraph 33 says
2 that the plaintiffs were told by their brokers that through
3 the special access of LBI that they're able to invest with
4 the other --

5 THE COURT: So that's not -- okay. So, okay. So
6 that's -- let's say that that's true. Okay? Each of the
7 claimants was told that LBHI itself was investing in the
8 reference funds. That might have been true.

9 MS. ALPERSTEIN: Right. Paragraph 36 we allege
10 that the LBI brokers said to the claimants that they had an
11 excellent or really great opportunity to invest indirectly.

12 THE COURT: Okay. Suppose -- so let's take that
13 as true. Let's take that as true. That's a classic
14 subjective sales pitch. Really great opportunity, here,
15 invest.

16 MS. ALPERSTEIN: The problem is that given that
17 the company knew at the time that the PPM contained false
18 and misleading allegations, as we have -- excuse me -- false
19 and misleading information, as we have alleged about LBHI,
20 there was a duty to disclose the truth, because they were
21 long-standing customers, there's a fiduciary role there,
22 they're actively targeting them, they're seeking them out,
23 they're calling them up and saying great opportunity.
24 There's no qualifier, there's no expect, you know, LBHI is
25 not in great condition, but it's still a great opportunity

1 for you. There's nothing.

2 THE COURT: What's your authority for the -- so
3 your authority for getting past the possibility that these
4 brokers had no knowledge of Repo 105. Which let's be real,
5 they didn't have any knowledge.

6 MS. ALPERSTEIN: And we don't allege that they do.
7 I know they didn't, Judge.

8 THE COURT: Okay. Okay. So what's the authority
9 for the fact that assuming that Dick Fuld knew about
10 everything that's in if examiner's report, what specifically
11 -- what's the authority for attributing that knowledge and
12 scienter to these brokers who it looks like were just doing
13 what they had always done?

14 MS. ALPERSTEIN: It's two-fold. There's -- the
15 first piece of it is the corporate scienter of LBI itself,
16 which is established by the knowledge of its officers and
17 directors about the falsity of the PPM.

18 THE COURT: Okay. That's not scienter. That's
19 not scienter. That is the attribution of the knowledge of
20 LBHI and the knowledge of LBI. You say it's the -- Dick
21 Fuld knows.

22 MS. ALPERSTEIN: But with respect, Judge, the
23 knowledge of LBI as a corporate entity about the truth or
24 falsity of what happened at LBHI --

25 THE COURT: But what's the -- what's the authority

1 for the scienter of these individuals that with intent they
2 are making fraudulent statements that they intend the client
3 to rely on? What's the --

4 MS. ALPERSTEIN: The authority is that their
5 specific intent is not what's at issue. The specific intent
6 is the intent of LBHI who sent them out. So they acted --

7 THE COURT: LBI you meant.

8 MS. ALPERSTEIN: LBI.

9 THE COURT: You meant LBI.

10 MS. ALPERSTEIN: I'm sorry. LBI sent them out.
11 So LBI knows that what it's having its brokers say is not
12 true.

13 THE COURT: But what's the authority --

14 MS. ALPERSTEIN: It's the --

15 THE COURT: What's the -- give me a case.

16 MS. ALPERSTEIN: I will give you the --

17 THE COURT: Give me a case that says that even in
18 a situation in which there is no proof whatsoever that the
19 brokers had no subjective intent, right?

20 Let's talk about -- talk about the Climan (ph)
21 case, okay, in the Second Circuit where they said that the
22 broker's subjective intent on the quality of the investments
23 were not false, they honestly didn't believe they were
24 saying anything false at the time, and therefore it's not
25 actionable.

1 MS. ALPERSTEIN: The difference there though,
2 Judge, is that in those cases you don't have the pre-
3 existing knowledge on behalf of the company.

4 So what you -- if this were a case, for example,
5 where we didn't have the Dick Fuld and the O'Mearas and the
6 Kalans, all we have is the brokers, you would need that
7 individualized intent of the brokers because there'd be
8 nothing to show that the company's agent -- that the
9 company, via its agents, knew what the agents were saying
10 was false. But that's the ordinary situation.

11 Here we have the unusual situation that the
12 company itself, its knowledge can be gleamed by the
13 knowledge of its corporate officers. So that's already
14 extant and out there at the time that the brokers are sent
15 out. The brokers are acting solely as agents, they are
16 functionally mouthpieces for the entity. So we have not
17 sued them. We are not going after them for false and
18 misleading statements that they made in our own capacities
19 that are then attributable to the company.

20 The point is that what they say at the behest of
21 the company is actionable, because the company itself knew
22 that what they were saying didn't have merit and that they
23 should have disclosed the truth about the financial
24 condition of LBHI.

25 THE COURT: But -- okay. But the disconnect, and

1 I appreciate we've been going at it for a long time, we're
2 going conclude soon -- but the disconnect is that when you
3 look at the statements they strongly encourage the purchase
4 of the warrants, there was no mention of the true financial
5 condition. Okay. They X an opportunity to invest. So if
6 at that time -- we're talking about Dick Fuld's knowledge,
7 right? Dick Fuld knows number one there's been some
8 accounting stuff that went on here, eventually there's going
9 to be an examiner's report that talks about Repo 105, but
10 I've just gotten off the phone with the White House and
11 looks like we're going to be bailed out. Right? So they're
12 selling these securities at that moment where Dick Fuld
13 believes Lehman is going to survive, notwithstanding the
14 existence of financial issues. That's -- so that's the
15 framework, right?

16 So the broker is on the phone, he's Dick Fuld, he
17 knows, uh-oh, I've engaged in some bad things on an
18 accounting basis, some of the stuff is kind of shady, but
19 I'm going to be bailed out because I'm too big to fail. So
20 therefore you're good to buy this security because Lehman is
21 going to survive.

22 It doesn't -- I mean I know it's not palatable and
23 it's not attractive, but if you try to get to the end of the
24 day, as I'm trying to do here, and I try to imagine your
25 prevailing, which is what I'm really trying to do, I'm

1 trying to imagine how you prevail, because what I -- that's
2 part of what I'm doing. I don't want to resolve any facts,
3 but I'm having a hard time -- it goes to plausibility -- I'm
4 having a hard time imagining plausibly how these claims
5 could prevail.

6 MS. ALPERSTEIN: Well, Judge, our argument is that
7 the claimants wouldn't have purchased these securities in
8 the first place if they had known the truth about LBHI's
9 financial condition.

10 I cannot tell you whether if they had known the
11 truth, but they were guaranteed up and down that the
12 government was going to bail them out and therefore the
13 financial condition -- I think the upshot of your argument
14 is that the financial condition of LBHI was functionally
15 immaterial, because regardless of that condition it wouldn't
16 matter to an investor because they were going to get bailed
17 out --

18 THE COURT: Well it was not so much --

19 MS. ALPERSTEIN: -- no matter what and made whole.

20 THE COURT: Right. It was not so much the
21 financial condition as the -- you know --

22 MS. ALPERSTEIN: The ability to be bailed out.

23 THE COURT: The survival of -- the likelihood of
24 the survival of LBHI.

25 MS. ALPERSTEIN: But I think that at the time that

1 these were sold the question was really is this an
2 investment that the claimants would have made based on the
3 financial condition? That condition was not accurately
4 portrayed and that's the basis of the claim. And
5 particularly given the knowledge of LBI that the PPM that it
6 was disseminating and having its brokers go out and
7 disseminate was not accurate.

8 THE COURT: So let me slightly shift though.

9 MS. ALPERSTEIN: Okay.

10 THE COURT: How is this different than a case in
11 which a different type security, let's -- a SWAP or
12 something.

13 MS. ALPERSTEIN: Okay.

14 THE COURT: Okay? And the broker -- the
15 prospectus says this is really risky, you could lose
16 everything, right?

17 MS. ALPERSTEIN: Uh-huh.

18 THE COURT: And then the allegation is that the
19 broker said, don't worry what it says in the prospectus,
20 okay, this is going to be fine, this is just like investing
21 in fixed government securities fully backed by FDIC. Okay?
22 In that case the claimant loses. The claimant loses.

23 MS. ALPERSTEIN: The claimant --

24 THE COURT: The document wins. The broker
25 knowingly has said -- has puffed, has made misleading

1 statements. The law in that scenario is that the prospectus
2 that you're given is what you should have believed and what
3 you reasonably relied on. It wasn't reasonable for you to
4 rely on the sales pitch of the broker. How do I get out of
5 that one?

6 MS. ALPERSTEIN: I think in two ways. Your
7 hypothetical ignores two critical points.

8 One is that in your hypothetical there's no false
9 and misleading statement that's made in the underlying
10 prospectus or PPM, which is what we have here. You have
11 solely a PPM that has a risk factor in your hypothetical
12 that says you can lose your shirt but not a series of false
13 and misleading representations about the ability of the
14 counter party in the SWAP to pay. So that's one
15 distinction, so I think that makes your hypothetical
16 inapplicable.

17 And the second is that in our case because of the
18 nature of the fiduciary relationship between LBI and its
19 customers there was a duty to disclose the truth when that
20 truth was known to the company.

21 In effect, and we do allege this, LBI shouldn't
22 have been acting as placement agent using a false and
23 misleading PPM. But it armed its brokers with that PPM
24 knowing it was false and misleading and had them sell the
25 product, and it shouldn't have done that. It should have

1 abstained in effect. Or if it was going to have them sell
2 the product it should have had them sell the product with
3 some kind of caveat if they weren't going have that caveat
4 in the PPM itself.

5 So it was a combination of factors, neither of
6 which was in the hypothetical that you posed, Judge. So, I
7 don't think that that's an issue.

8 THE COURT: All right. Before you lose your voice
9 let me ask the trustee to respond briefly, and then I think
10 we're going to have to conclude. Thank you.

11 MR. MITCHELL: Thank you, Your Honor.

12 We'll just briefly note that the issues still seem
13 to be the same. There's questions of what is and what
14 should not be attributed to LBHI and we keep coming back to
15 the same point. The statements and the actions that are
16 complained of are all LBHI centric.

17 There's this notion of this knowledge of the
18 financial condition and whether or not LBHI would be bailed
19 out.

20 Those are things again back in time when the
21 warrants were purchased they were purchased to be held to
22 maturity, which is over three and a half years in the
23 future. The plausibility of prescience or clairvoyance, the
24 ability of anyone at that point to peg exactly, well three
25 and a half years in the future, and the claimants have even

1 said that's not what they're saying.

2 THE COURT: But don't they have to have an
3 opportunity to establish that what's in the examiner's
4 report was known to LBI? If what's in the examiner's report
5 was known to LBI, right?

6 MR. MITCHELL: Yeah.

7 THE COURT: And they knowingly went out and sold
8 an LBHI product knowing what was in the examiner's report
9 then that would be bad.

10 MR. MITCHELL: If that were proven it still does
11 not speak to securities fraud with respect to the purchase
12 of their warrants. It just doesn't.

13 THE COURT: Say that again?

14 MR. MITCHELL: If that were to be proven it still
15 does not speak to the securities fraud claim with respect to
16 their purchase of the warrants, because of the
17 countervailing influence. Just to cite a couple of cases.

18 THE COURT: LBI -- what they're saying is LBI --

19 MR. MITCHELL: Uh-huh.

20 THE COURT: -- knowingly and intentionally sold
21 the warrants and they knew that LBHI had a poor financial
22 condition. So that in addition to saying, hey, this is a
23 risky investment, you could lose everything.

24 MR. MITCHELL: Uh-huh.

25 THE COURT: What they needed to have said was

1 specifically there's all this stuff on LBHI's balance sheet
2 that you ought to know about, this, that, the other thing.
3 If you still feel uncomfortable after that then you can buy,
4 and that LBI knew that. That's where I get to the fact --
5 that's where I get to the hesitation with respect to
6 resolving issues of fact, because we're still at a
7 sufficiency hearing.

8 MR. MITCHELL: Yes, Your Honor.

9 THE COURT: We're still at a sufficiency hearing.

10 And so for them not to have the ability to take it
11 to the next level, which, you know, for all the reasons that
12 we've been talking at and talking around, you know, there
13 are huge hurdles, but I still feel that notwithstanding
14 Janus and Climan, and all of these other cases we've
15 identified, a fact issue that's inappropriate to resolve at
16 a sufficiency hearing.

17 I think it's a hugely heavy lift to get to the
18 finish line. Hugely heavy lift to get to the finish line,
19 but I feel that we have accomplished something by the
20 dialogue by identifying something that feels like a fact
21 issue and that feels like something that ought not to be
22 resolved at a sufficiency hearing.

23 MR. MITCHELL: Actually, Your Honor, if I could
24 address that --

25 THE COURT: Sure.

1 MR. MITCHELL: -- briefly.

2 With respect to that and that heavy lift that you
3 refer to, that speaks directly to what we were talking about
4 before with --

5 THE COURT: Plausibility.

6 MR. MITCHELL: -- the plausibility.

7 THE COURT: Right.

8 MR. MITCHELL: The Telabs' factor.

9 When it was that heavy of a lift that weighs in
10 favor of saying you've alleged the possibility, you haven't
11 crossed the line to plausibility. It's not that they have
12 to absolutely prove, that's not what Telabs stands for, but
13 if looking at all of the facts as pled, as the Court noted,
14 the claimants have not pled that the claimants have said
15 that their broker said anything specific about the absolute
16 fact that LBHI is going pay on their warrants, or they
17 haven't -- you know, there's lots of things that just
18 haven't been pled with particularly. They haven't met the
19 standards yet at this point.

20 With respect to what is known and what is not
21 known and what -- you know, knowing these facts about Repo
22 105, knowing the facts about everything that's in the
23 examiner's report, would that resolve the problem? The
24 problem is three and a half years -- over three and a half
25 years in the future when LBHI, when these things mature, and

1 then the calculations is done, and if the claimants are in
2 the money is LBHI going to be around? Well there's case law
3 that speaks to those things. There's case law -- *Acida v.*
4 *Imsera* (ph) from the Second Circuit, "Defendant's lack of
5 clairvoyance simply does not constitute securities fraud."
6 That seems to be what we keep coming back to. *Padanny*
7 *versus Robertson Stevens* (ph).

8 THE COURT: But they're distinguishing that by
9 saying -- let me try to give an example. They're
10 distinguishing that by saying, you know, it's not about the
11 fact that no one could anticipate that the housing market
12 would collapse, et cetera, and that therefore there would be
13 a bankruptcy. They're saying, no, no, no, it's not about
14 that.

15 MR. MITCHELL: Uh-huh.

16 THE COURT: Look, there was this massive stuff
17 that took place that occurred at the time. Now the examiner
18 has identified it and it's got a name.

19 MR. MITCHELL: Uh-huh.

20 THE COURT: But Dick Fuld knew it at the time.
21 Factually he knew it at the time, and that therefore that
22 was something that should have been in a prospectus issued
23 by LBHI designed to get people to buy --

24 MR. MITCHELL: Uh-huh.

25 THE COURT: -- LBHI securities. So -- and that

1 those facts were not included LBI knew they weren't
2 included, LBI sent its brokers out to sell with that
3 knowledge, it didn't matter that they thought LBHI was going
4 to be bailed out. That --

5 MR. MITCHELL: Understood, Your Honor. And that's
6 -- and then we get back to Rombach v. Chang, we get back to
7 that framework wherein you've got the court saying in a
8 circumstance in which there were things on the horizon,
9 where the entity saw it. Well, you know, we've got some
10 difficulties, we've got some problems. But you know what,
11 we've also got some good things cooking, and we are
12 optimistic about our outlook.

13 And so the court said to plaintiffs who had a very
14 similar thing, you didn't tell us the absolute truth, you
15 didn't lay out all of the potential problems, you defrauded
16 us. And the court said, no, no, no, that's not fraud.

17 And that's what it comes down to, this question.
18 It's not enough -- it just doesn't raise the bar enough even
19 if we were to take Repo 105 and all of that it doesn't raise
20 the bar, because we're still dealing with the facts
21 surrounding the particular warrants purchased by the
22 claimants with a maturity date over three and a half years
23 in the future, again courts have said, a lack of
24 clairvoyance knowing about what's going to happen then does
25 not constitute securities fraud. You can't say well

1 bankruptcy happened in the intervening period, you should
2 have known, you should have told us more. Courts have said
3 you can't do that. That's not the basis for a securities
4 fraud.

5 Romback v. Chang says, you know what, these people
6 who are running this corporation they're entitled to be
7 optimistic about the future.

8 Again, we come back to the same issue with under
9 the Telabs' framework. The facts as pled do not give rise
10 to a compelling inference of fraud with respect to the
11 warrants, and that is -- that are the -- those are the
12 securities in question.

13 The claimants seek to have Judge Kaplan's thoughts
14 on the examiner's report and all those other things with
15 respect to publicly issued, publicly traded securities on an
16 impersonal market under a different framework. That is not
17 applicable to these securities. These securities are very
18 specific.

19 And the PPMs, as much as the claimants want to
20 stay well, you know, these were generic, those risk factors
21 don't mean anything. As the Court noted and the trustee
22 agrees, how much stronger can a risk factor be in bold
23 letters, you could lose everything?

24 And in their -- by the way, if LBHI goes
25 bankruptcy I don't know how they want that qualified even

1 more. They're asking to have clairvoyance on the other
2 side. They're saying, well, you know, they should have
3 known. Again, fraud by hindsight, not a valid complaint.
4 So --

5 THE COURT: Okay.

6 MR. MITCHELL: -- the legal framework in this, we
7 understand the Court's concerned about facts, but even given
8 those in relation to the facts with respect to these claims
9 it does not rise to securities fraud.

10 THE COURT: Okay. Well you've given me a lot of
11 think about. I think we need to conclude, especially since
12 I have a 2 o'clock hearing, and thank you very much for the
13 excellent and thoughtful presentations, and you'll hear from
14 us when you hear from us.

15 MS. ALPERSTEIN: Thank you very much, Judge.

16 THE COURT: All right? Thank you very much.

17 (Recessed at 12:37 p.m.; reconvened at 2:02 p.m.)

18 THE COURT: Hello, Ms. Marcus. How are you?

19 MS. MARCUS: Good morning, Your Honor -- oh, good
20 afternoon, excuse me.

21 THE COURT: Good afternoon.

22 MS. MARCUS: I'm not usually here in the
23 afternoon. There's been a request, Your Honor, to go a
24 little out of order --

25 THE COURT: Okay.

1 MS. MARCUS: -- on the agenda, if that's okay with
2 you.

3 THE COURT: So what is it that folks would like to
4 do?

5 MS. MARCUS: To start with the Moore Macro motions
6 to compel.

7 THE COURT: I don't think that's a good idea. I
8 think the Moore Macro motions, unless parties have
9 substantially advanced from the positions that are reflected
10 in the papers, I think that's going to take quite a long
11 period of time. So is there a reason why we can't begin
12 with Utah --

13 MS. MARCUS: Not at all.

14 THE COURT: -- with the Utah matter?

15 MS. MARCUS: Not at all, not as far as we're
16 concerned.

17 THE COURT: All right. So let's start with the
18 Utah matter and then we can reexamine the issue of whether
19 Moore Macro or the status conference in the U.S. Bank
20 adversary goes forward next.

21 MS. MARCUS: That's fine --

22 THE COURT: Is that all right?

23 MS. MARCUS: -- Your Honor, yes.

24 THE COURT: Okay, thank you.

25 MS. MARCUS: And in connection with that matter,

1 Weil is actually representing the debtors in that matter and
2 my partner Christopher Cox, Christopher J. Cox is here.

3 THE COURT: Okay.

4 MS. MARCUS: He was admitted pro hac vice by Judge
5 Peck, but he hasn't appeared before you before.

6 THE COURT: Okay.

7 MS. MARCUS: He's from our Silicon Valley office.

8 THE COURT: Okay, very good. Welcome.

9 MR. COX: Good afternoon, Your Honor.

10 THE COURT: Hello.

11 MR. SLAUGHTER: Good afternoon, Your Honor. May
12 it please the Court, William Slaughter of Ballard Spahr on
13 behalf of Utah Housing Corporation, formerly known as Utah
14 Housing Finance Agency.

15 This is a dispute, Your Honor, between Lehman and
16 Utah Housing concerning the valuation of --

17 THE COURT: Right.

18 MR. SLAUGHTER: -- interest rate swaps following
19 the bankruptcy. There's no dispute as to the propriety of
20 the terminations. There are three counts in the complaint,
21 two counts of breach of contract under state law and one
22 count of unjust enrichment under state law.

23 We've moved to dismiss on two grounds --

24 THE COURT: Right.

25 MR. SLAUGHTER: -- one is the forum-selection

1 clause in the swap agreements and the other is the doctrine
2 of sovereign immunity, and I'll deal with them in that
3 order, if that's okay.

4 Each of the --

5 THE COURT: So let me --

6 MR. SLAUGHTER: Oh, you're going to jump right --

7 THE COURT: -- so first of all --

8 (Laughter.)

9 THE COURT: -- first of all --

10 MR. SLAUGHTER: Somehow I thought I wouldn't get
11 that far.

12 THE COURT: Yeah.

13 (Laughter.)

14 THE COURT: You got farther than you thought?

15 MR. SLAUGHTER: I got to introduce who I was.

16 THE COURT: Right. All right, so I've spent a lot
17 of time with the papers and a lot of time --

18 MR. SLAUGHTER: Terrific.

19 THE COURT: -- thinking about the issues that you
20 raise and I'm zeroing in on, subject to everybody continuing
21 to argue what they'd like, I'm zeroing in on the exact
22 language, because that's what I have to do, right? So the
23 exact language that I'm zeroing in on is Part V of the
24 schedules that altered the ISDA -- right? -- say, "with
25 respect to any proceedings against Utah Housing, such

1 proceedings shall be brought only in the courts or tribunals
2 in which such proceedings may be brought against Utah
3 Housing under the laws of the State of Utah and submits to
4 the jurisdiction of such courts."

5 More significantly, I believe, is the following,
6 "Although" -- and I'm saying Utah Housing, because that's
7 the party -- "Although Utah Housing is an independent agency
8 of the State of Utah is entitled to immunity on the grounds
9 of sovereignty in certain situations, immunity from suit is
10 statutorily waived by Utah Housing as to any of its
11 contractual obligations, including, but not limited to,
12 payment obligations under this agreement."

13 So that's the big hook on which your argument
14 rests, one of the big hooks, right?

15 MR. SLAUGHTER: Well, there are two equally big
16 hooks.

17 THE COURT: Okay, two equally big hooks. That's
18 one of the big hooks on which your argument rests is that
19 the waiver is a statutory waiver, it's only waived to the
20 extent it's waived in the Utah statute, right? And in the
21 Utah --

22 MR. SLAUGHTER: Yes.

23 THE COURT: I'm not trying to tricky you --

24 MR. SLAUGHTER: No, no, I'm saying that's the --

25 THE COURT: -- okay? I'm not trying to trick you.

1 MR. SLAUGHTER: -- I'm saying that's correct --

2 THE COURT: And the Utah statute --

3 MR. SLAUGHTER: -- that the Utah statute --

4 THE COURT: -- says --

5 MR. SLAUGHTER: -- says only in Utah.

6 THE COURT: Right. So that's exactly where my
7 interest is, because then the next sentence after the
8 semicolon says, "and proceedings may be brought against Utah
9 Housing in such courts and tribunals as are permitted under
10 the laws of the State of Utah."

11 MR. SLAUGHTER: Correct.

12 THE COURT: Right? And what you've told me is --

13 MR. SLAUGHTER: The laws of the State of Utah --

14 THE COURT: The laws of the State of --

15 MR. SLAUGHTER: -- provide --

16 THE COURT: -- Utah provide you can only sue me in
17 Utah --

18 MR. SLAUGHTER: And there is --

19 THE COURT: -- right?

20 MR. SLAUGHTER: -- case after case after case that
21 says that, the statute says that, and there's no authority
22 that's been presented to you to suggest otherwise. You get
23 it.

24 THE COURT: I get it. However, if you were
25 drafting this, if you were drafting this, fewer words could

1 have been used to more clearly convey the point that you can
2 only sue Utah Housing in Utah. It doesn't say that. It
3 says, "may be brought against such courts and tribunals as
4 are permitted in the laws of the State of Utah." It's
5 oblique where it could have been direct.

6 MR. SLAUGHTER: I'm not going to argue with you,
7 Judge Chapman that --

8 THE COURT: And --

9 MR. SLAUGHTER: -- I didn't write this --

10 THE COURT: -- with all due respect to --

11 MR. SLAUGHTER: -- and --

12 THE COURT: -- the legislature of Utah --

13 MR. SLAUGHTER: -- I can --

14 THE COURT: -- I'm just making --

15 MR. SLAUGHTER: -- I can --

16 THE COURT: -- a simple observation.

17 MR. SLAUGHTER: -- certainly tell you that this
18 not the only provision of the swap agreements that you've
19 had to address that could have been written more precisely
20 than it was written. You could have just said Utah; they
21 didn't say that, they said the courts permitted by the law
22 of Utah. There can be no dispute that the law of Utah
23 permits an action against Utah Housing to be brought only in
24 the courts of the State of Utah.

25 THE COURT: But it would have been more

1 straightforward to simply say that instead of --

2 MR. SLAUGHTER: I don't think more straightforward
3 is the standard. I think --

4 THE COURT: More direct.

5 MR. SLAUGHTER: -- the standard is whether this
6 provision -- what this provision is intended to mean, and it
7 is intended to mean that the action against Utah Housing
8 under the swap agreement may -- shall be brought only -- I
9 mean, there's an argument here that this is not a mandatory
10 provision --

11 THE COURT: I understand.

12 MR. SLAUGHTER: -- it's a mandatory provision --
13 shall be brought only in the courts that are permitted by
14 the laws of -- that -- only in the courts in which actions
15 against Utah Housing may be brought under the laws of the
16 State of Utah, and there are only Utah courts in which
17 actions against Utah Housing may be brought under the laws
18 of the State of Utah.

19 I don't see how you can go from the observation
20 that you might have drafted this more precisely --

21 THE COURT: You're --

22 MR. SLAUGHTER: -- to say that I don't --

23 THE COURT: -- you're assuming that I'm going
24 somewhere that I haven't gone yet. I'm merely asking the
25 question --

1 MR. SLAUGHTER: I can't tell you that I wouldn't
2 have drafted it with fewer words.

3 THE COURT: Okay. So my next question is, if we
4 could find the person at Lehman Brothers who was involved in
5 this negotiation and we could ask him, do you remember, you
6 did these 80 agreements with Utah? And he'll say, oh, yes,
7 I remember. And he were to testify that Utah Housing led
8 him to believe that under the laws of the State of Utah
9 meant other courts, would that make a difference?

10 MR. SLAUGHTER: I only think that you can get to
11 those kind of extra-contractual evidence of intend if you
12 think the agreement is ambiguous.

13 THE COURT: Well, but -- so --

14 MR. SLAUGHTER: This agreement --

15 THE COURT: -- you've joined me exact --

16 MR. SLAUGHTER: -- this agreement --

17 THE COURT: Can I --

18 MR. SLAUGHTER: -- Your Honor --

19 THE COURT: -- when I --

20 MR. SLAUGHTER: -- is not ambiguous.

21 THE COURT: -- when I talk, I get to talk, you get
22 to not. Okay? When you read this and you read the totality
23 of it, and you begin to think about why the extra words had
24 to be used, including in the forum-selection clause about
25 the submission to jurisdiction, you could make a plausible

1 argument, if this were not legislation-based, you could make
2 a plausible argument that there's an ambiguity here, don't
3 you --

4 MR. SLAUGHTER: I --

5 THE COURT: -- you don't agree?

6 MR. SLAUGHTER: With great respect, Your Honor, I
7 could not disagree more.

8 THE COURT: Okay.

9 MR. SLAUGHTER: This clause is clear, it says,
10 "shall be brought only in the courts in which they may be
11 brought under the laws of the State of Utah." There is no
12 argument that has been made in these papers or otherwise
13 that suggests that an action against an agency of Utah under
14 Utah law may be brought in tribunals outside of the State of
15 Utah. You cannot, with great respect, Your Honor --

16 THE COURT: It's okay, you don't --

17 MR. SLAUGHTER: -- squeeze --

18 THE COURT: -- have to keep saying that.

19 MR. SLAUGHTER: -- well, squeeze an ambiguity into
20 that.

21 THE COURT: Well, the ambiguity I think arises by
22 the fact that it says they may be brought in such courts and
23 tribunals as are permitted under the laws of the State of
24 Utah, it appears to invoke a wider variety of laws.

25 MR. SLAUGHTER: Unless someone can come up with a

1 colorable argument as to how under the laws of the State of
2 Utah an action against an agency of the state may be brought
3 out of state, which with great respect to my friends --

4 THE COURT: You don't have to keep --

5 MR. SLAUGHTER: -- they have not come up with, you
6 cannot get to the kind of ambiguity or any ambiguity at all
7 that would permit consideration of the kind of extra-
8 contractual evidence that you're talking about. I mean --

9 THE COURT: Okay.

10 MR. SLAUGHTER: All right? And --

11 THE COURT: So let me ask my next set of
12 questions. Of course, I don't know whether what's alleged
13 is true, what's alleged --

14 MR. SLAUGHTER: You mean, non --

15 THE COURT: -- with respect to the --

16 MR. SLAUGHTER: -- on the merits?

17 THE COURT: -- underlying transactions --

18 MR. SLAUGHTER: Yes.

19 THE COURT: -- okay? What's alleged is that, when
20 the music stops, the swaps were in the money to Lehman and
21 that \$48 million was paid, a large amount of money --

22 MR. SLAUGHTER: I think that's alleged and agreed,
23 so --

24 THE COURT: Okay. It's further alleged that
25 subsequently Utah Housing entered into replacement

1 transactions -- it's alleged, I don't know -- that --

2 MR. SLAUGHTER: No, we did.

3 THE COURT: Okay, that netted it approximately \$9
4 million.

5 MR. SLAUGHTER: That we don't agree with --

6 THE COURT: Okay.

7 MR. SLAUGHTER: -- because the replacement
8 transactions were not on the same terms as the transactions
9 that were terminated.

10 THE COURT: Okay. So there's --

11 MR. SLAUGHTER: But that's a dispute.

12 THE COURT: -- there's grounds for disagreement.

13 So where issue is joined has to do with how much additional
14 money --

15 MR. SLAUGHTER: If any.

16 THE COURT: -- or not, if any, Lehman should be
17 paid by Utah. And it -- right?

18 MR. SLAUGHTER: Correct.

19 THE COURT: Okay. And it appears to be the case
20 that an entity called Swap Financial Group advised Utah in
21 connection with these transactions.

22 MR. SLAUGHTER: In connection with the
23 terminations, yes.

24 THE COURT: Yes. So bottom line is, you say, if
25 LBHI wants to bring an action against Utah Housing for these

1 amounts that are allegedly owed, it has to be done in the
2 state courts of Utah --

3 MR. SLAUGHTER: As agreed in the contract.

4 THE COURT: -- as agreed in the contract and as
5 reflected in the statute.

6 So I have two follow-up questions, completely
7 unrelated. One, don't I have in rem jurisdiction because
8 the contract is property of the estate and also the amounts
9 that weren't paid are property of the estate? That's
10 question number one. And question number two is with
11 respect to the -- I don't know how to characterize it --
12 it's not a representation, but the assertion, the
13 observation that Lehman doesn't have to worry about the
14 statute of limitations because it has available to it a
15 savings clause under Utah law?

16 MR. SLAUGHTER: I knew you would ask the second
17 question, so I'll do that --

18 THE COURT: Okay.

19 MR. SLAUGHTER: -- one first.

20 THE COURT: Do you want to take that one first?

21 MR. SLAUGHTER: Absolutely, that's a nonissue.
22 There is a savings clause, it gives them one year from the
23 date of dismissal. Assuming this action was timely filed
24 when it was filed and you dismiss it, they have a year to
25 sue us in Utah.

1 THE COURT: Okay, I'm going to -- but that's not
2 quite as much as I'm looking for.

3 MR. SLAUGHTER: What more do you need?

4 THE COURT: I need a representation -- you're
5 asking me to as a factor --

6 MR. SLAUGHTER: I give you that representation, go
7 ahead and tell --

8 THE COURT: You give me the representation that
9 assuming this action was timely filed, if I were to dismiss
10 it and it were to be lodged in the state court of Utah
11 appropriately consistent with Utah's claim of sovereign
12 immunity and all of its statutory requirements, that Utah
13 Housing would not assert a time bar?

14 MR. SLAUGHTER: That is correct.

15 THE COURT: All right. Now go to my first
16 question.

17 MR. SLAUGHTER: I made very clear in the papers
18 that we do not --

19 THE COURT: Well, you made very clear that you
20 believed that that was available, that there is a savings
21 clause, but it was short of representing that it would not
22 -- that there would not be an assertion that it didn't
23 apply. So, thank you for the straight answer to my pointed
24 question.

25 MR. SLAUGHTER: Okay.

1 THE COURT: Next is --

2 MR. SLAUGHTER: So now the other question is --

3 THE COURT: -- the in rem jurisdiction.

4 MR. SLAUGHTER: -- the jurisdiction, I don't think
5 we've ever contended that this Court doesn't have
6 jurisdiction under 1334 over claims that the estate can
7 issue.

8 THE COURT: Not the issue.

9 MR. SLAUGHTER: It's -- the argument that we're
10 making is based upon a contractual forum selection. It is
11 not a statutory or constitutional -- you know, for that
12 point it's not a statutory or constitutional argument as to
13 jurisdiction, it is simply a question of whether this
14 federal court, consistent with controlling Supreme Court
15 authority, will enforce the parties' agreement as to forum.
16 By definition, Your Honor, you don't get into forum
17 selection unless there are two courts that potentially have
18 jurisdiction. So we don't contend that this Court wouldn't
19 otherwise have jurisdiction, we simply say that you must --
20 let me withdraw that -- you should enforce the parties'
21 agreement as to forum. It's a venue issue, albeit a
22 mandatory venue issue, not a jurisdictional issue.

23 THE COURT: So I'm just trying to follow you,
24 because I'm taking it in a slightly different order.

25 MR. SLAUGHTER: I do -- okay, I'll --

1 THE COURT: In other words, you're saying that
2 even if in rem, my in rem jurisdiction trumps your sovereign
3 immunity claim, which I think DPH says --

4 MR. SLAUGHTER: Your Honor, you're jumping to the
5 second ground.

6 THE COURT: Okay. Well you --

7 MR. SLAUGHTER: And I'm happy to -- I'm happy to
8 address --

9 THE COURT: -- switched them up. So where I am --

10 MR. SLAUGHTER: -- I'm happy to address --

11 THE COURT: -- is -- where I am is --

12 MR. SLAUGHTER: -- I'm happy to address the second
13 ground. Ground number one is the parties agreed --

14 THE COURT: Okay.

15 MR. SLAUGHTER: -- that this action must be
16 brought, you must enforce that agreement, unless there is
17 some exceptional circumstances --

18 THE COURT: Okay.

19 MR. SLAUGHTER: -- which don't exist here.

20 THE COURT: Got it.

21 MR. SLAUGHTER: If this were a core action, you
22 would weigh the benefits of centralization in bankruptcy
23 over the policy favoring enforcement of the parties'
24 agreements, but this is not a core action, this is not a
25 core action, and the cases very clearly say that in a non-

1 core proceeding you have to go where the agreement tells you
2 to go.

3 THE COURT: Okay, next.

4 MR. SLAUGHTER: Now, sovereign immunity --

5 THE COURT: Right.

6 MR. SLAUGHTER: -- which is separate and distinct
7 and applies even if the parties hadn't --

8 THE COURT: I got it.

9 MR. SLAUGHTER: -- said anything in their
10 agreement --

11 THE COURT: I got it.

12 MR. SLAUGHTER: -- sovereign immunity says that,
13 as an agency of the State of Utah, Utah Housing may only be
14 sued where it's been consented to be sued. Okay?

15 THE COURT: Right.

16 MR. SLAUGHTER: And that's an element of
17 sovereignty of our states and it extends to state agencies.
18 Utah Housing has consented in the immunity act to be sued on
19 contract obligations, but only in Utah. That's what the
20 immunity act says --

21 THE COURT: Right.

22 MR. SLAUGHTER: -- and that's what the cases
23 interpreting the immunity act --

24 THE COURT: Okay.

25 MR. SLAUGHTER: -- universally provide.

1 THE COURT: Right.

2 MR. SLAUGHTER: In the swap agreements --

3 THE COURT: Right.

4 MR. SLAUGHTER: -- the provision dealing with
5 contractual waiver, without making reference to Section 501
6 of the immunity act specifically, makes reference to it
7 implicitly by saying that Utah Housing is subject to
8 sovereign immunity, but has statutorily --

9 THE COURT: Statutorily --

10 MR. SLAUGHTER: -- waived --

11 THE COURT: -- right.

12 MR. SLAUGHTER: -- that immunity for contract
13 claims. And of course the immunity act contains such a
14 statutory waiver of contract claims, but that waiver is
15 limited under the same statute to actions in Utah.

16 So very simply, our argument on sovereign immunity
17 is that Lehman nor any other person may sue Utah Housing,
18 may sue the State of Utah, except where and to the extent it
19 has consented to be sued.

20 THE COURT: But now we're talking past each other,
21 because in DPH -- right? So you're saying there was a
22 contractual waiver, there was a contractual statutory
23 waiver, right?

24 MR. SLAUGHTER: Now I -- you mentioned DPH, I know
25 where your --

1 THE COURT: Okay.

2 MR. SLAUGHTER: -- thinking is.

3 THE COURT: So now in DPH there was no waiver and
4 the Second Circuit said in rem jurisdiction --

5 MR. SLAUGHTER: But --

6 THE COURT: -- trumps sovereign immunity. So it
7 wouldn't --

8 MR. SLAUGHTER: -- let me see if I can --

9 THE COURT: -- matter -- it wouldn't matter that
10 you had waived it to some extent only, because my in rem
11 jurisdiction would still trump that --

12 MR. SLAUGHTER: Okay.

13 THE COURT: -- right?

14 MR. SLAUGHTER: Can I --

15 THE COURT: Yes.

16 MR. SLAUGHTER: Yes, if this were core, if this
17 were a bankruptcy cause of action. That's what the Katz
18 decision held, that by --

19 THE COURT: So I agree with you --

20 MR. SLAUGHTER: Okay.

21 THE COURT: -- it was core, but why should core
22 versus non-core --

23 MR. SLAUGHTER: Because --

24 THE COURT: -- matter -- please let me finish --
25 why should core versus non-core -- thank you for your

1 patience -- why should core versus non-core matter when
2 we're talking about jurisdiction? Because the general rule
3 is that, if I have jurisdiction, I'm supposed to exercise
4 it. So why does core versus non-core serve as kind of like
5 a yellow stop light to my going ahead and exercising in rem
6 jurisdiction without -- not about forum selection, just vis-
7 à-vis sovereign immunity?

8 MR. SLAUGHTER: I have --

9 THE COURT: Got it?

10 MR. SLAUGHTER: -- an answer, Your Honor.

11 THE COURT: Okay, go ahead.

12 MR. SLAUGHTER: So you need to take a look at the
13 Supreme Court decision in the Katz case, which dealt with
14 the question of waiver of sovereign immunity in the context
15 of bankruptcy. And what the Katz court -- what the case
16 before the Supreme involved there was a preference claim and
17 what the Katz court reasoned was that, by ratifying the
18 Constitution which delegated to Congress the power to make
19 laws on the subject of bankruptcies, the states consented to
20 be sued under such laws.

21 The causes of action that Lehman is asserting
22 against Utah Housing in this case do not arise under any law
23 on the subject of bankruptcy. It's not a preference claim,
24 it's not a fraudulent claim, it's not a claim of invalidity
25 due to ipso facto or any of the other types of causes of

1 action that we think of when we think about laws on the
2 subject of bankruptcies. And there have been a number of
3 cases since the Katz decision which have drawn precisely
4 this distinction, that if it is a bankruptcy cause of action
5 you don't need anything more, states have waived it. But if
6 it's a cause of action that is simply a piece of property
7 that the debtor's estate under Section 541 it is not waived
8 by virtue of the adoption of the Constitution and,
9 furthermore, the statute itself, by which I mean the
10 Bankruptcy Code, has a provision dealing with abrogation of
11 state sovereign immunity and it excludes actions that are
12 simply property of the estate by virtue of 541.

13 So neither the adoption of the Constitution nor
14 Congress' intent in passing the -- in adopting the
15 Bankruptcy Code gives bankruptcy courts the power to preside
16 over actions that -- against estates that are not bankruptcy
17 actions, and that's the distinction.

18 In the DPH case, which I've mentioned multiple
19 times in the papers, is a non-precedential summary order,
20 you know, which you I'm sure saw and appreciated, but the
21 point about the DPH case is that that was a core -- it was
22 determined to be a core action, because it involved a
23 dispute over the ongoing administration of the debtor's
24 estate having to do with the workers' compensation claims,
25 as well as a claim asserted against the debtor's estate,

1 which is one of, as you know, categories of core matters.

2 There is no claim against the debtor's estate that
3 could serve as a hook for that, nor is there any ongoing
4 administration matters that affect -- that could give you
5 like there was in DPH. DPH found the dispute in there to be
6 a core dispute and on that basis it's distinguishable from
7 this even if it were otherwise precedential, which it isn't.
8 So, Your Honor, I think you've got the issues and you've got
9 our arguments.

10 THE COURT: Okay.

11 MR. SLAUGHTER: I would --

12 THE COURT: Why don't I give Mr. Cox a chance to
13 explain to me why you're wrong.

14 MR. COX: Thank you, Your Honor. Christopher Cox,
15 Weil, Gotshal & Manges, appearing for the estate.

16 Your Honor, in listening to the colloquy, I'd like
17 to just focus in on the issues that seem to matter most to
18 you and --

19 THE COURT: Or anything you like, that's fine.

20 MR. COX: So the first thing I'd like to bring up,
21 Your Honor, is there is no dispute that venue is proper
22 here. And if you read the Atlantic Marine case, which is
23 the central case that's cited by Utah Housing, it's
24 important to understand that in their venue analysis,
25 applying that here, venue is proper. And so what we need to

1 do is --

2 THE COURT: Well, venue is proper in the sense
3 that the cause of action arose here.

4 MR. COX: Yes, and it could be brought here. And
5 so what Atlantic Marine says is you have to look at a forum-
6 selection clause in a contract, and then you need to either
7 apply the 1404 transfer rules or forum non conveniens. And
8 what's really important here is to keep in mind that forum
9 non conveniens is always a discretionary order. It's an
10 analysis by the court and the court exercises its discretion
11 as to whether or not it will keep the case or send it. So
12 it always is based on discretion. And here I'd like to just
13 discuss with you two reasons why the Court can and should
14 keep this case, both under the plain language and under a
15 forum non conveniens analysis applying Atlantic Marine.

16 So the first thing is plain language. You focus
17 exactly on what the issue is here. The forum-selection
18 clause doesn't say what Utah Housing says it says and that
19 would have been the easiest provision to ever write. You
20 know, if there's only one court, which is the District Court
21 for the State of Utah in the County of Salt Lake, that is
22 the easiest venue provision you could possibly write.

23 THE COURT: I agree, but just because you and I
24 and I think Mr. Slaughter all agree that we could have done
25 a better job drafting it or, if you had gotten this draft,

1 you would have crossed it out and said District Court of
2 Utah doesn't mean that when you track it all through, as
3 frankly I assume somebody did when they entered into these
4 80 swap agreements, that you track it through and you get to
5 the fact that what they really meant is Utah state courts,
6 that's what they really meant.

7 MR. COX: Well, Your Honor, let's just apply, you
8 know, the first principles of contract analysis, right?
9 Which is let's look at the plain language and let's look at
10 it in context.

11 So the jurisdiction provision isn't limited to
12 simply this one little sentence that Utah Housing wants to
13 focus on, it's much broader than that, and what it breaks
14 down into is it provides for four possible venues for cases
15 arising under this contract. The first one is in subsection
16 (i). What it says is Lehman is submitted to the non-
17 exclusive jurisdiction of either the courts of the State of
18 New York, the United States District Court located in the
19 Borough of Manhattan, or the state or federal courts of
20 Utah, essentially, it's paraphrasing.

21 Now, that's how you write a mandatory provision,
22 right? It's not that these people didn't know how to do it.
23 When we're talking about whether you're going to be in
24 federal court, it says the United States District Court
25 located in the Borough of Manhattan, it's very specific.

1 And that's what mandatory clauses are, they're specific,
2 they say you shall go to this one place.

3 Now, let's focus on Utah Housing's provision.
4 Your Honor focused on the exact right language, right? So
5 what it says is, "proceedings shall be brought only in the
6 courts or tribunals," plural, right? They're telling you
7 now there's one court in one county, that's the only place
8 we could do it. It says courts or tribunals. And it
9 finishes off by saying that they submit to the jurisdiction
10 of such courts or tribunals. If they were statutorily
11 obligated to be in one court --

12 THE COURT: Right, why would they have to submit
13 to the jurisdiction.

14 MR. COX: -- why would they submit to a
15 jurisdiction? So when you read through the entirety of the
16 jurisdiction provision and with -- keeping in mind that's
17 the Court's obligation and duty to give meaning to all the
18 words of the claim and not to rewrite it or blue-pencil it,
19 but to give words to all the -- you know, meaning to all the
20 words, what it is is it's a permissive clause that discusses
21 bringing actions in four different jurisdictions and we're
22 in one of them right now, right? So that's the first thing
23 to keep in mind.

24 The second thing to keep in mind is, regardless of
25 whether Your Honor finds this is mandatory or permissive,

1 you still come out to the same place, because we're applying
2 Atlantic Marine. And Utah Housing concedes whether
3 expressly or tacitly in its briefing that, whether you find
4 this permissive or mandatory, you can still hold onto this
5 case in applying Atlantic Marine. And so I'd like to just
6 discuss a little bit about that.

7 So Atlantic Marine, the first thing we need to
8 look at are what are the facts, right? So in Atlantic
9 Marine there was a contract and the contract had a provision
10 in it that said any disputes arising out of the contract
11 need to be filed in the state court of Virginia in Norfolk
12 or in the Eastern District of Virginia in Norfolk, very
13 specific. So what did the plaintiff do? The plaintiff went
14 to Texas and intentionally didn't follow the provisions of
15 the contract that required you to file in Norfolk.

16 And so in that case the court as a matter of
17 policy said in a forum non conveniens or a 1404 context,
18 we're not going to give deference to the parties' choice of
19 forum and we're not going to look at the private interest
20 factors such as availability of evidence, service of, you
21 know, process and all those other things, because the
22 plaintiff should have known better. The plaintiff should
23 have filed in Norfolk, because when they negotiated this
24 contract they knew there was only place that there was going
25 to be a litigation and that litigation was in Norfolk.

1 That's not the situation we have here. What we have is
2 we have the Southern District of New York, federal court,
3 contemplated as a potential venue for this case. So you
4 don't throw out the private interest factors and punish
5 Lehman for filing within a contemplated jurisdiction and say
6 we're not going to do the traditional forum non conveniens
7 analysis, because under the reading of this that I think is
8 the right one is this is a permissive clause.

9 And Utah Housing really doesn't fight on that at
10 all, right? When you look at the private interest factors
11 discussed in the briefs, they give it a footnote to
12 basically say, yeah, there are witnesses in Utah. But we
13 put in the Dean Melchior affidavit discussing where the
14 contract was signed, where the payments were made, where the
15 valuation was done.

16 And Your Honor has zeroed in on a very important
17 fact, right? The actual valuation here was done by Schwab
18 Financial and we know Peter Shapiro is in New Jersey, right?
19 Schwab Financial is here. And then when you're looking at
20 the different private interest factors, which is, one, the
21 plaintiff's choice of forum, the sources of proof, access to
22 evidence, and making the trial easy, expeditious and
23 inexpensive, they weigh heavily for this jurisdiction. It's
24 within your Court's discretion to hold onto this case.

25 Now, even if you looked at the forum-selection

1 clause and decided it was mandatory, Atlantic Marine says
2 you can still exercise your discretion, hold onto it, if the
3 case is unusual or there are extraordinary circumstances,
4 and that is passed over in Utah's briefing. If you actually
5 read the briefing, they just said there's nothing
6 extraordinary to see here, move along. But in reality, this
7 is the poster child for an extraordinary circumstance in
8 which the Court should hold onto a case and exercise its
9 discretion under a forum non conveniens analysis.

10 Now, there's no dispute --

11 THE COURT: But that's just because you
12 characterize the experience of the Court with similar
13 actions, that's all that that is --

14 MR. COX: Well, it --

15 THE COURT: -- right?

16 MR. COX: -- one, it is, but I think what we've
17 seen from the withdrawal of reference motions that have been
18 taken up at the District Court, they're really applying the
19 same factors that you would in the public interest factors
20 here. And what they're saying is that this is
21 extraordinary, this is unusual. And frankly, Your Honor,
22 what you're going to see in this case is you're going to see
23 this issue play out dozens of times, it's going to be the
24 same ISDA, it's going to be the same definition of loss,
25 it's going to be the same players. You're going to see Swap

1 Financial, you're going to see Cain Brothers, they all did
2 the same thing.

3 THE COURT: Really?

4 MR. COX: And if we peel off this one case and we
5 send it to Utah to a judge who is not steeped in these
6 issues --

7 THE COURT: But who can become steeped in them.

8 MR. COX: Absolutely. But the point I'm trying to
9 make is that Lehman now is subject to inconsistent rulings.
10 What's going to happen is whatever happens in Utah is now
11 going to be argued to be collateral estoppel or res judicata
12 here --

13 THE COURT: But that won't -- but that's not the
14 case. You know better than that, that's not the case. If
15 you file this suit in Utah and the Utah court finds that the
16 process was improper and that Lehman is owed an additional
17 amount, there is no collateral estoppel whatsoever as far as
18 the next case involving the next counterparty.

19 MR. COX: That's right, Your Honor, but estoppel
20 is a one-way ratchet. Utah Housing is a one-off player, if
21 they lose and we fund it, we don't get the benefit of
22 collateral estoppel or res judicata, it only works against
23 us. So if the Utah court comes up with a different
24 interpretation of what loss requires --

25 THE COURT: Right.

1 MR. COX: -- then it can be used against us in an
2 estoppel --

3 THE COURT: By whom?

4 MR. COX: By anybody.

5 THE COURT: But I don't understand that. In the
6 next swap valuation/termination case, the fact that a judge
7 in Utah credits what Swap Financial did and finds that Utah
8 doesn't owe Lehman any more money has absolutely no weight
9 or bearing on what happens in the next case involving the
10 next swap counterparty where the circumstances surrounding
11 the termination and the replacements and all of the other
12 things that we do in those cases has no -- it has no bearing
13 on it.

14 MR. COX: As a factual matter, that's absolutely
15 correct --

16 THE COURT: Right.

17 MR. COX: -- you're absolutely right. From a
18 legal perspective on interpreting loss, what the parties'
19 obligations were under the contract at the time of
20 termination --

21 THE COURT: I still wouldn't -- I mean, with all
22 due respect, it would not have -- be -- it would not carry
23 weight. They're going to be my cases, I'm going to try
24 them, I'm going to say what the contract requires or not,
25 and that's just not going to have any weight. The worst

1 that can happen is that, you know, just as might happen
2 here, you don't know whether Lehman would prevail or not.
3 We don't know, because we don't know what the facts are.

4 MR. COX: Well, it gets into, I think it was the
5 opinion in the Welmont (ph) case, right? Which is it's very
6 important for the estate to have intra-case uniformity in
7 the decisions, who we're in front of --

8 THE COURT: Sure.

9 MR. COX: -- you know, what we're arguing, and
10 that is exactly a public interest factor that weighs heavily
11 on keeping that here.

12 And the point, Your Honor, which I'm just trying
13 to underscore is it's discretionary for you.

14 THE COURT: Understood.

15 MR. COX: But simply because this hasn't come up
16 yet -- that agreement was 2013, right? I mean, every fact
17 pattern hasn't played out yet --

18 THE COURT: Right.

19 MR. COX: -- but I think it's clear and it's, you
20 know, acknowledged in Utah Housing's briefing that if you
21 find -- even if you found that this was mandatory, you're
22 still going to have the discretion to keep the case and
23 that's what we would urge you to do.

24 THE COURT: Is there anything that you want to say
25 with respect to the sovereign immunity?

1 MR. COX: No, Your Honor. You know, we cited the
2 DPH case. I was frankly looking for the Katz opinion in my
3 papers while it was being discussed, so I could read it and
4 address the issues that were there. But we think in this
5 situation, first, the DPH case does, you know, say that your
6 in rem jurisdiction would override any sovereign immunity
7 and we don't think it's necessary that it be
8 constitutionally waived in that situation, it's a different
9 situation. And so I would just leave it at that.

10 THE COURT: All right, thank you.

11 MR. COX: Thank you, Your Honor.

12 THE COURT: So, Mr. Slaughter, what about the
13 argument that there are multiple courts that are mentioned?

14 MR. SLAUGHTER: Your Honor, I was hoping to have
15 the opportunity to answer that.

16 THE COURT: Okay.

17 MR. SLAUGHTER: The provision that they're talking
18 about is a provision that applies generally, the provision
19 that we're talking about is the provision that applies to
20 proceedings against Utah Housing. The provision they're
21 talking about is that a general submission jurisdiction,
22 non-exclusive jurisdiction of the states of New York, the
23 United States of New York City, the federal courts, as well
24 as the state and federal courts of Utah. That's the general
25 provision, which would apply, for example, if Utah Housing

1 were the plaintiffs. But proceedings against Utah Housing,
2 which after all is the sovereign entity in this contract,
3 may only be brought where Utah law permits them to be
4 brought. And the generally submission to jurisdiction of
5 the state and federal courts here, there and in Utah is not
6 what applies to actions or proceedings against Party B.
7 There's a specific, separately negotiated clause that's in
8 the --

9 THE COURT: Well, what about the conflict with the
10 provision, I think it's Section 63(g)(7) 5023, that says
11 that venue is proper in the county in which the claim arose?

12 MR. SLAUGHTER: Your Honor, let me address that,
13 because --

14 THE COURT: Sure.

15 MR. SLAUGHTER: -- I don't think I -- in answering
16 your questions before, I didn't think I got to it. So they
17 cite the general venue statute of Utah. Number one, that's
18 not applicable to cases against state agencies. There is a
19 specific statute that's applicable to cases against state
20 agencies and that statute says, as we've discussed, only in
21 the courts of Utah. Even if you could bring an act -- even
22 if the Utah general venue statute could be interpreted to
23 say you can sue other defendants where the cause of action
24 arose even if it's out of state, which I don't think, by the
25 way, is the correct way to look at a state venue statute.

1 The correct way to look at the state venue statute is, when
2 you're in the state courts, which county do you go to, not
3 do you go to New York or Timbuktu.

4 It has to do with -- not to suggest that New York
5 isn't a great place to be too, but it's -- the general venue
6 statute is talking about which counties in Utah you may
7 bring an action and one of those is of course where the
8 cause of action arose. That's not -- even if that gave them
9 what they wanted, it's not applicable here. The provision
10 that's applicable here is the one dealing with claims
11 against state agencies and that statute, as we have said,
12 provides that it can only be brought --

13 THE COURT: Is -- by way of background, has this
14 claim -- I truly don't know the answer to the question --
15 has this claim gone through any sort of ADR?

16 MR. SLAUGHTER: Yes.

17 THE COURT: It has?

18 MR. SLAUGHTER: We've had ADR proceedings,
19 submission of extensive submissions. I'm sure that you know
20 what goes on. We had a full day in -- of negotiations,
21 which I won't characterize as other than to say that they
22 did not result in an agreement. And I don't think that the
23 mediation is technically closed, but there hasn't been --

24 THE COURT: Do you believe that continuing the
25 conversation would help?

1 MR. SLAUGHTER: No. I -- you asked a straight
2 question --

3 THE COURT: I asked, you answered.

4 MR. SLAUGHTER: -- I'm giving you a straight
5 answer. Judging -- no -- who knows whether people's
6 positions would change, but judging from the positions that
7 have been articulated to us and judging from our evaluation
8 of the merits, I don't think --

9 THE COURT: Are you familiar with a case involving
10 the Washington Tobacco Settlement Authority?

11 MR. SLAUGHTER: I don't know. I can't possibly --
12 I don't remember which one that is.

13 THE COURT: Well, it was one in which I believe we
14 had nine days of trial and probably two days of testimony by
15 Mr. Shapiro sitting right there, and the case ultimately
16 settled.

17 MR. SLAUGHTER: So Mr. Shapiro just -- you may
18 have formed a judgment about him, he is not the person who
19 advised Utah Housing.

20 THE COURT: Swap Financial Group is the entity
21 that was involved, just by way of background.

22 MR. SLAUGHTER: Your Honor --

23 THE COURT: I just like everybody to have all
24 facts that might be relevant to their consideration of the
25 way to terminate a dispute.

1 Mr. Cox, do you believe that further discussions
2 would be a good idea?

3 MR. COX: Of course, we always think that
4 settlement is a better option than litigating.

5 THE COURT: So why don't you folks agree to go
6 have one more session before I render a decision and then
7 I'll render a decision.

8 MR. SLAUGHTER: Your Honor, if you order us to do
9 it, we will do it. I have no authority to agree voluntarily
10 to do it.

11 THE COURT: Well, why don't you inquire --

12 MR. SLAUGHTER: I will.

13 THE COURT: -- of your clients and you can report
14 back --

15 MR. SLAUGHTER: Of course.

16 THE COURT: -- and we'll go from there. And
17 depending upon what the answer is, I'll issue a decision
18 shortly after that. But I very much appreciate the papers,
19 the thorough arguments and getting a chance to talk to you
20 about the issues today.

21 MR. SLAUGHTER: Thank you, Your Honor.

22 THE COURT: All right? Thank you.

23 Okay. Do the folks in the U.S. Bank case
24 adversary wish to proceed now or are we to turn to Moore
25 Macro next?

1 MR. COSENZA: Sure, Your Honor.

2 THE COURT: Mr. Cosenza, are you ready?

3 MR. COSENZA: Yeah, we're ready, we're ready.

4 THE COURT: All right, why don't you come on up.

5 MS. MARCUS: Your Honor, may we be excused?

6 THE COURT: Yes. Thank you, Ms. Marcus.

7 MS. MARCUS: Thank you.

8 THE COURT: Mr. Cosenza, I'm quite sorry that you
9 had to make two trips down here today. Had I realized that,
10 I would have tried to save you the subway fare.

11 MR. COSENZA: No, no worries, no worries at all,
12 Your Honor. We actually had to accommodate I think Mr.
13 Burke's schedule --

14 THE COURT: Okay.

15 MR. COSENZA: -- because he had an appearance
16 before Judge -- I forget which judge, but he was down here
17 on another matter.

18 THE COURT: Okay.

19 MR. COSENZA: Good afternoon, Your Honor.

20 THE COURT: Good afternoon.

21 MR. COSENZA: Unlike our proceeding this morning,
22 which seemed to go relatively smoothly, unfortunately, I
23 have to report that since our last appearance before you
24 three weeks ago things have not gone smoothly in this
25 matter. There's been a failure of the parties to agree to a

1 briefing schedule on the issue that you raised during our
2 last argument, our ninth count, which is basically what I'll
3 describe in short as the standing issue. We've also had an
4 inability to reach a schedule on the briefing for the
5 reserved motion. (Indiscernible) counsel immediately
6 before, you know, this conference seemed amenable to the
7 briefing schedule we proposed in our letter, so hopefully
8 that will move things along.

9 But there are two, I think, big issues here, Your
10 Honor. One is, we've received notice from Green Point -- or
11 actually we didn't receive notice, but we saw in a letter
12 that was submitted to the state court judge that Green Point
13 is going to ask Your Honor to abstain from deciding the
14 standing issue. We didn't -- I know Your Honor, I don't
15 think is copied on this letter.

16 THE COURT: Was Green Point here when we were all
17 together last time?

18 MR. BURKE: Yes, Your Honor, we were.

19 THE COURT: And you didn't think it would be a
20 good idea to mention that to me?

21 MR. BURKE: This was a decision subsequent to
22 that hearing.

23 MR. COSENZA: Your Honor, I have a copy --

24 MR. BURKE: They had just been served with a
25 complaint at that time.

1 MR. COSENZA: So, Your Honor, that's one issue
2 that needs to be addressed today. The second issue which --
3 you know, obviously, we're moving to --

4 THE COURT: We were all here. And there was
5 absolutely no suggestion that the course of action that I
6 was suggesting which was designed primarily to address the
7 concerns of the parties in the state court action that I not
8 do anything to interfere with that action which Lehman's
9 proposed course of action will not do. You didn't think
10 that it was, I don't know, the right thing to do to mention
11 that if we go down that path, you might be asking the state
12 court -- you might be asking me to abstain? That's just not
13 the way I'm used to having folks operate. That's pulling
14 punches.

15 MR. BURKE: No, Your Honor. It was not something
16 we had discussed or entertained prior to that conference.
17 So it was not something we could have raised with you at
18 that time.

19 THE COURT: So out of that conference should
20 have come the conclusion that I just have to sit here and do
21 nothing because that's what you were saying was that I just
22 have to sit there and do nothing as I preside over this case
23 and with the greatest respect to the state court judge, how
24 ever long it takes, I don't what he or she has on their
25 plate, that I just have to do nothing instead being

1 practical and seeking to move along the administration of
2 the case. I proposed that we do certain things. Everyone
3 seemed to be in agreement or amenable to it. And now I'm
4 being told that that was a fool's errand. And that makes me
5 unhappy.

6 MR. BURKE: I'm sorry, Your Honor. That was not
7 our intention. However, after reviewing all of the issues
8 and all of the facts, we have reached the conclusion that
9 we, number one, we'll move to dismiss this complaint as to
10 Greenpoint. And the Court is perfectly free to address all
11 of the issues relating to U.S. Bank's claim and Syncora's
12 claim that don't involve us. So we think you have all the
13 tools you need to deal with what Lehman really cares about.
14 You don't need us here for that. But in considering whether
15 that process made the most sense, we reached a conclusion
16 that, no, the state court's been working on this for six
17 years. This should be there not here.

18 THE COURT: Because it's here doesn't mean it's
19 not still there. I expressly declined to do anything to
20 interfere with the disposition of what's pending in the
21 state court.

22 MR. BURKE: And that motion is still pending, Your
23 Honor. Your Honor has not decided that motion. The motion
24 to stay is still out there.

25 THE COURT: Would it make a difference if I were

1 to deny the motion to stay? I don't think so based on what
2 you just said because if that's the issue, you could have
3 just said it.

4 MR. BURKE: I tried to at the end of the
5 conference, Your Honor.

6 THE COURT: Okay.

7 MR. BURKE: And Your Honor made the speech that
8 you made, that you needed to take it under advisement.

9 THE COURT: Okay. I'm all hearing this in real
10 time so I'm not going to try to overreact. I'm simply
11 trying to react to these new facts and to the feeling that
12 parties weren't as forthright with me. Your statement that
13 you didn't think of it at the time, I accept at face
14 value --

15 MR. BURKE: Yes.

16 THE COURT: -- and we can go from there. But I
17 don't believe that anything that I've undertaken to do here
18 in any way should interfere or diminish what happens in the
19 state court. Everyone agreed -- everyone agreed that
20 because Lehman's not a party there, it had to be able to do
21 what it needed to do that what happened there wouldn't
22 collaterally estop Lehman. So simply by saying to Lehman do
23 what you need to do here was a way of addressing everybody's
24 concerns. Now you --

25 MR. BURKE: Vis-à-vis the other two parties and

1 the people who are here because they filed claims here, yes.

2 THE COURT: Okay. Well, Mr. Cosenza is knitting
3 his brow and I'm knitting my brow back and forth because I'm
4 not sure I really understand the nuances of what you're
5 saying. So I don't --

6 MR. BURKE: We're not -- we're not needed. Your
7 Honor has all the tools you need to address Syncora and U.S.
8 Bank's claims, the estimation proceedings, all of the things
9 that --

10 THE COURT: They want to bring an action regarding
11 the validity of the assignments. That's what they want,
12 right?

13 MR. COSENZA: That's correct, Your Honor.

14 THE COURT: That's what they want to do.

15 MR. BURKE: And that issue is what is directly
16 before the state court and was --

17 THE COURT: Albeit not with Lehman as a party.

18 MR. BURKE: Correct.

19 THE COURT: Okay. Well, why don't we leave it
20 there and we'll see what happens --

21 MR. BURKE: In the interest of full --

22 THE COURT: At the same time that you inform the
23 state court, you might have cc'd this Court.

24 MR. BURKE: I'm sorry about that, Your Honor. In
25 the interest of full disclosure, we will also be moving to

1 withdraw the reference for this case as well for the same
2 reasons.

3 THE COURT: Okay.

4 MR. COSENZA: Your Honor, I don't want to continue
5 to dwell on this but just for your reference, may I
6 approach? And this is the letter that we were able to pull
7 off the state court docket that was sent regarding --

8 THE COURT: Sure.

9 MR. COSENZA: -- the extensions to --

10 THE COURT: Thank you.

11 MR. COSENZA: So, Your Honor --

12 THE COURT: Could you give me a moment to read it?

13 MR. COSENZA: Sure.

14 (Pause)

15 THE COURT: Okay. Go ahead.

16 MR. COSENZA: Your Honor, and in terms of its
17 development and also the -- we've had very significant
18 difficulty. One, getting all the parties to agree to a
19 suitable confidentiality stipulation in order that will
20 allow us to provide access to --

21 THE COURT: That seems like it was just resolved
22 within the last couple of hours.

23 MR. COSENZA: Correct. So I think that now has --

24 THE COURT: Okay.

25 MR. COSENZA: That issue now should be to the

1 side. It's critical because that actually is -- approving
2 that order now sort of sets a timetable to setting up a full
3 briefing schedule on the ninth cause of action that allows
4 us to provide access to --

5 THE COURT: Right.

6 MR. COSENZA: -- all the New York state court
7 proceeding materials and also provide Greenpoint with access
8 to the unredacted version of the --

9 THE COURT: Let me ask a follow-up question now
10 that I've been told not only about the request to abstain
11 but the motion to withdraw the reference. Is there also
12 going to be a request for a stay pending a decision on the
13 motion to withdraw the reference?

14 MR. BURKE: Yes, Your Honor. Yes, Your Honor.

15 MR. COSENZA: Your Honor, we're also -- this is
16 also the first we're hearing of this as well.

17 THE COURT: Okay. I mean, I assumed since I
18 assume counsel understands that the filing of a motion to
19 withdraw the reference doesn't affect the stay that,
20 naturally, there would be a request to stay pending
21 consideration of the motion to withdraw the reference. So
22 just kind of filling out the picture here.

23 MR. COSENZA: So, Your Honor, so on that issue in
24 terms of the briefing schedule, we would like -- we've tried
25 to work through --

1 THE COURT: All right.

2 MR. COSENZA: -- with the parties -- All right.

3 So let's work out a schedule today. So first -- so there's
4 two separate schedules, right, Mr. Cosenza?

5 MR. COSENZA: Correct. Correct.

6 THE COURT: Okay. So why don't you -- let's take
7 one. Which one should we do first?

8 MR. COSENZA: The first one, I think, is
9 (indiscernible) top. I think the first one should be the
10 "standing issue" and the timing for that. That's the
11 Greenpoint --

12 THE COURT: Okay.

13 MR. COSENZA: -- motion.

14 THE COURT: And what's the bid and the ask on
15 that?

16 MR. COSENZA: So I think the bid and the ask is
17 within -- excuse me -- the confidentiality order gets
18 entered within three days of the filing of the briefs, that
19 the papers would be submitted to you in a form of summary
20 judgments. I guess Lehman will file with you and deal with
21 the Court on our papers. So we'll get them to you within
22 three days. And then at that point, we'll start sort of the
23 briefing schedule. So we would like to have the defendants
24 in this case put in whatever supplements they need to
25 whatever's been put into the briefs. Obviously, they're

1 very familiar with the record already. Just something that
2 needs clarification or to give you an update on where things
3 are within seven days of the filing of the papers from the
4 New York state court action. And then we're not sure, as I
5 said last time, since we haven't access to all the briefings
6 and the unredacted version of the documents whether Lehman
7 will submit anything. But if we do, I think we'd want to
8 submit something quickly within seven and we'd propose --
9 within seven days of Defendants filing their papers. So
10 we're proposing a very quick schedule, Your Honor. We
11 really think this is an important issue to be teed up and
12 decided 'cause that will dictate the course of this
13 proceeding.

14 THE COURT: All right. So why don't I hear from
15 these folks --

16 MR. COSENZA: And I'll come back on Syncora.

17 THE COURT: Sure. Yeah. So it's a little
18 difficult given that you've now said you're going to file
19 papers that seek to have me do nothing. Nonetheless, we
20 need a briefing schedule.

21 MR. BURKE: Understood.

22 THE COURT: Okay.

23 MR. BURKE: And subject to reserving all of our
24 rights under the other motions we're going to make.
25 We're --

1 THE COURT: Okay.

2 MR. BURKE: -- prepared to address that.

3 THE COURT: Okay. So what's your counteroffer to
4 the seven days and seven days?

5 MR. BURKE: Greenpoint's position is they are
6 happy with the papers the way they are. They don't need
7 time to put in a response to the papers.

8 THE COURT: Okay.

9 MR. BURKE: What we need is if Lehman determines
10 it's going to submit something on its own that we have an
11 adequate time to reply. So that --

12 THE COURT: Okay.

13 MR. BURKE: That's all we need.

14 THE COURT: All right. So that's fine. So how
15 long do you think that you would like? You're going to tell
16 me it depends on what they say.

17 MR. BURKE: Well, there is discovery in the
18 underlying case. If they start citing documents that
19 weren't in the original papers, there may be some issues
20 about getting the counter documents or contacts documents
21 but it won't take
22 long --

23 THE COURT: It won't take long. Okay.

24 MR. BURKE: -- to respond if they put theirs in,
25 their proposal is now two weeks from tomorrow, I guess, is

1 what they propose.

2 THE COURT: Right. So two weeks from tomorrow
3 takes us into the first week of August.

4 MR. BURKE: Two weeks from that point should be
5 plenty for us.

6 THE COURT: So two weeks from that point no matter
7 what, right?

8 MR. BURKE: Unless the case is stayed.

9 THE COURT: No. I've moved off of that. No. I
10 meant no matter what Lehman puts in as a supplement, right?

11 MR. BURKE: Yes.

12 THE COURT: Okay. And then so two weeks from the
13 23rd, that takes you to August 6th, right?

14 MR. BURKE: That would theirs.

15 THE COURT: That would be theirs.

16 MR. BURKE: Right.

17 THE COURT: And then two weeks after that would be
18 yours, would be August 20th, right? And then they're saying
19 seven days after that. But I think to be fair, two weeks
20 after that would bring us still -- everyone would be done in
21 time for the Labor Day weekend subject to whatever else
22 happens on whatever else you're filing.

23 MR. BURKE: Yes. And I only speak to Greenpoint,
24 not to the others.

25 THE COURT: Okay. So, Mr. Cosenza, subject to

1 hearing from the others, does that two and two work -- two,
2 two and two work for you?

3 MR. COSENZA: Yeah. That's fine, Your Honor.

4 THE COURT: I think seven days is a little tight
5 especially in the summertime.

6 MR. COSENZA: I guess we can take a few more --
7 you know, a couple more days. But I guess we should also
8 just get out a calendar and sort of documents these and --
9 so we don't have to go back.

10 THE COURT: So if you're going to do what you're
11 going to do by August 6th --

12 MR. COSENZA: Yes.

13 THE COURT: -- right? And they're going to do
14 what they're going to do by August 20th. And then you would
15 have two weeks after that.

16 MR. COSENZA: That's perfect. That's perfect.

17 THE COURT: All right. And that gets you one --
18 that gets you to Thursday, September 3rd, which is the
19 Thursday before Labor Day.

20 MR. COSENZA: And also my birthday.

21 THE COURT: Happy birthday. Then you can file on
22 the 2nd so that your birthday can be free. Are the other
23 folks all right with that schedule?

24 MR. CRAIG: We're fine with that --

25 THE COURT: Okay.

1 MR. CRAIG: -- if the Court is fine with that.

2 THE COURT: Okay.

3 MS. BOLAND: And so as U.S. Bank --

4 THE COURT: Okay.

5 MS. BOLAND: -- is concerned, Your Honor.

6 THE COURT: Thank you very much. Is Lehman all
7 right with that schedule, Mr. Cosenza?

8 MR. COSENZA: Yes, I am, Your Honor.

9 THE COURT: Okay.

10 MR. COSENZA: I just have one point of
11 clarification.

12 THE COURT: Sure.

13 MR. COSENZA: I'm sort of confused by the timing
14 of the motion that's being proposed by Greenpoint.

15 THE COURT: The timing hasn't been specified for
16 either the motion for abstention or the motion to withdraw
17 the reference. So --

18 MR. COSENZA: And the sequencing is for --

19 THE COURT: Hasn't been specified.

20 MR. COSENZA: Okay. So with that, I'm sort of --

21 THE COURT: So there's nothing I can say about
22 motions that haven't been filed other than the observation
23 that I made which counsel seems to understand and agree that
24 the mere filing of a motion to withdraw the reference
25 doesn't work a stay of anything unless I order that it be

1 stayed.

2 MR. COSENZA: So, Your Honor --

3 THE COURT: And similarly then a stay can be
4 sought in the district court.

5 MR. BURKE: If denied by Your Honor.

6 THE COURT: If denied by me.

7 MR. COSENZA: So, Your Honor, I guess we would
8 request some sense to the timing because, you know,
9 obviously, if there's going to be intense breakdown on this
10 other issue, I'd like to get a sense as to what they're
11 planning on doing.

12 THE COURT: Well, sure. I mean, as a courtesy, I
13 think that that would be --

14 MR. BURKE: Sure.

15 THE COURT: -- a good thing to do.

16 MR. BURKE: Our deadline to respond to the
17 complaint is August 4th. The motion will be no later than
18 that. We hope to get it on file next week.

19 THE COURT: Both motions.

20 MR. BURKE: Correct.

21 THE COURT: All three motions.

22 MR. BURKE: Correct.

23 MR. COSENZA: Does that include the stay motion?

24 MR. BURKE: Yes.

25 THE COURT: Why don't you -- can we take a couple

1 of minutes. I think Mr. Kantor is trying to digest
2 everything that's happening. Okay. So why don't we just
3 take a moment and let them speak and then we can keep going?

4 (Pause)

5 MR. COSENZA: Your Honor, we're going through, and
6 this is all news to us. But one thing that does pop out at
7 us is there was the stay motion that was pending several
8 weeks ago that the parties basically agreed what to decide
9 so we can move forward on sort of what we thought was a
10 reasonable approach not impacting the state action but have
11 Your Honor decide the ninth cause of action.

12 THE COURT: Right.

13 MR. COSENZA: And the person --

14 THE COURT: And they obviously don't like what
15 happened --

16 MR. COSENZA: Yes.

17 THE COURT: -- right?

18 THE COURT: They didn't want me to stay it. I
19 said I wasn't going to stay it. And then I said I'm not
20 going to stay it but I'm going to do what I'm going to do
21 here. And they obviously went back and their clients said
22 don't let the bankruptcy court do anything. So now they're
23 filing a slew of motions. So you can tell that I'm not
24 exactly -- you can tell that I'm reacting with surprise to
25 that because I believe that it's inconsistent where things

1 were left which was that the state court absolutely should
2 do whatever it needs to do on whatever schedule it wants to
3 do it on but that I was going to proceed. I will consider
4 the motions that they filed on the merits. I think the
5 track record here -- I'm not making it up. You can go
6 search the docket. The track record on motions to withdraw
7 the reference is that almost across the board, they are
8 denied with respect to anything that has to do with anything
9 like this. Every once in a while, they aren't denied.
10 Whatever district court judge gets this motion to withdraw
11 the reference will decide it.

12 So there's nothing more that I can say. I've
13 already reacted, perhaps too much to motions that haven't
14 been filed yet, but to me, this new game plan just strikes
15 me as being inconsistent with the spirit of what we did at
16 the last hearing which was largely, I thought, to give the
17 defendants exactly what they wanted and they expressed no
18 opposition to allowing Lehman to do what it needed to do.

19 So, you know, I said it six different ways --

20 MR. COSENZA: Yes.

21 THE COURT: -- now and I just have to -- there's
22 also a precedent in what we refer colloquially as to as the
23 distributed action in which something not dissimilar
24 occurred and Lehman filed a motion to compel me to withdraw
25 -- someone to withdraw a motion to withdraw the reference

1 which I denied. And then it went up to the district court.
2 So there's a limit to what I appropriately can do and I've
3 now reached that limit including reaching a limit of my
4 patience.

5 MR. COSENZA: I understand, Your Honor, and we're
6 sort of surprised and disappointed as well because we
7 thought we had a reasonable game plan going forward on this.

8 Should I move to simpler --

9 THE COURT: Yeah. So why don't you move to the
10 reserve motion?

11 MR. COSENZA: So, Your Honor, you know, I raised
12 this issue at the last hearing. It seems as though now
13 there's some agreement on the schedule. I do want to raise
14 to you one, I think, sort of overarching point here which is
15 there's no doubt in our view and in the plan administrator's
16 view that we are all reserved for this claim by a
17 significant amount of money. I think we know that the
18 reserve right now is way too high. We haven't gotten a firm
19 view as to what the actual losses here incurred by Syncora
20 are. We're going to get that out during the briefing.
21 We're going to have some targeted document discovery to try
22 to understand what their precise losses are so we can
23 actually get a pinpoint estimate 'cause we really think
24 there's an obligation here on our part to get the money out
25 to the creditors. And this money shouldn't just be tied up

1 and sort of a nebulous claim that this doesn't have much
2 basis.

3 The second component of this is, Your Honor, U.S.
4 Bank is the trustee for this particular trust. And one
5 other issue which we've raised in our adversary complaint
6 but maybe it's, in light of today's hearing and having to do
7 moving on the protocol, U.S. Bank -- we're thinking about
8 how the protocol should work. Given the loans that are in
9 this trust, you know, U.S. Bank will basically have to work
10 their losses for -- of actual losses incurred by this trust.
11 Another way of actually getting to the right number would be
12 U.S. Bank actually going to the loan by loan process for the
13 loans that are in this particular trust and go through the
14 steps of the protocol to sort of actually come to a number
15 that is, you know, the right number and whatever the
16 additional reserve is for this particular claim to be dealt
17 with swiftly and the monies, whatever it is, to be paid out
18 to U.S. Bank as the trustee and the rest of the money to be
19 released out to the creditors.

20 So there's almost two issues here. We have one --
21 and they're tied together. You have one is an over reserve
22 for the Syncora claim and obviously part of the five billion
23 dollars, that's already reserved for the RMBS claims. Part
24 of that is attributable to this trust and we do want to sort
25 of go through and figure out what money we owe on that. And

1 that has been working so far with the protocol and maybe the
2 time has come for U.S. Bank to take a move and try to put
3 those loans through the protocol so we can get to the right
4 number and pay off that claim to this particular trust --

5 THE COURT: So are you suggesting --

6 MR. COSENZA: -- and try to wrap this up.

7 THE COURT: So are you suggesting that, in effect,
8 the modification to the protocol that causes U.S. Bank to
9 kind of jump the line? I'm not clear on how the two things
10 fit together.

11 MR. COSENZA: Yeah. No. I think so -- I think
12 you raise a good point. I think what we would -- if U.S.
13 Bank went through the protocol for these particular loans in
14 this one trust, Lehman Brothers would move quickly. And we
15 can work out an accelerated time frame to try to go through
16 these particular claims 'cause we do think the five -- some
17 portion of the five billion plus the 600 million is way over
18 reserved for this particular trust unless it is associated -
19 -

20 THE COURT: So now I'm trying to understand --
21 'cause this is now new as well to me and perhaps to these
22 folks. So would that be in lieu of proceedings on reducing
23 the reserve?

24 MR. COSENZA: No. I think it's part of the same
25 motion. You know, the first step is sort of understanding

1 what Syncora's losses are would be to go through and figure
2 out for the reserve what that number should be. And once
3 that we figure out what generally what that number should be
4 based on their losses and what they think their losses are,
5 we get to that number for the reserve. And then the next
6 step would be to go through the protocol process to this
7 particular one trust and those loans to see what part of the
8 reserve is actually absorbed through the losses that are put
9 forward --

10 THE COURT: Are these loans --

11 MR. COSENZA: -- leading to that particular trust.

12 THE COURT: -- otherwise in the protocol, though?

13 MR. COSENZA: They --

14 THE COURT: Is it one of the trusts that's subject
15 to the protocol?

16 MR. COSENZA: Yes. It's not --

17 THE COURT: Okay. That was the disconnect --

18 MR. COSENZA: Yeah. That's --

19 THE COURT: -- that I was having. It's not
20 otherwise -- it's not one of the group of trusts that's in
21 the protocol.

22 MR. COSENZA: Correct. As of now, yes, that's
23 correct.

24 So, Your Honor, I guess, just highlighting it so -
25 - in terms of a briefing schedule on the motion to lower the

1 reserve, I think that's step 1 for handling this claim to
2 try to figure out what these incurred losses are. Once you
3 get to that and you get some money out to the creditors,
4 step 2 would be, okay, what are the actual losses --

5 THE COURT: Right.

6 MR. COSENZA: -- incurred by this. And that's
7 what we're proposing for this.

8 THE COURT: Okay. So now I've got knitted brows
9 over here. I'm not sure these folks understand what it
10 fully means to go through the protocol. And it's now been
11 confirmed that they're not in the protocol already.

12 MR. COSENZA: Sure.

13 THE COURT: So let's try to get one thing done.
14 Is there an agreement on the briefing schedule to reduce the
15 reserve?

16 MR. COSENZA: I believe there is. John?

17 MR. CRAIG: Yes, there is, Your Honor.

18 THE COURT: There is. Okay. So why don't you
19 tell us what that is?

20 MR. COSENZA: I think it's what's set forth in our
21 letter, right?

22 MR. CRAIG: Sure.

23 THE COURT: It's what's in the letter?

24 MR. COSENZA: Yeah. So I believe we have August
25 31 for our motion.

1 THE COURT: Okay.

2 MR. COSENZA: Syncora's opposition, September 21.
3 And then Lehman's reply, September 28th. I do want to flag
4 for Your Honor that we are going to, again, going to have
5 some targeted discovery. The documents and potentially even
6 a deposition but we're not certain on that to sort of
7 understand where their losses are coming from.

8 THE COURT: All right. I don't think I'm in a
9 position to give you -- you haven't asked but I'm not in a
10 position to give you a hearing date right this --

11 MR. COSENZA: Sure.

12 THE COURT: -- moment. Presumably, you'd be
13 looking for something in October.

14 MR. COSENZA: That's correct, Your Honor.

15 THE COURT: Okay. Well, if you could give us some
16 time to regroup, we can give you a hearing date.

17 MR. COSENZA: That would be great.

18 THE COURT: And we can do that before you file it.

19 MR. COSENZA: Thank you, Your Honor.

20 THE COURT: All right. So we're going to leave
21 the issue of implementation of the protocol for another day.
22 Perhaps what would make sense is for you to talk to these
23 folks about it, explain it to them. Try to persuade them
24 that would be a fruitful exercise. And then maybe the next
25 time you come back we could see where that stands.

1 MR. COSENZA: Sure. That makes sense, Your Honor.

2 THE COURT: Okay. But it sounds like, again, in
3 the interest of having as few surprises as possible, are we
4 going to be going on a standard briefing schedule for the
5 motions that are about to be filed? Because I will tell you
6 that it is August and I am planning on not being here for at
7 least a day.

8 MR. BURKE: We have no concern about how that
9 plays out. I'm sure they'll want time to put in their
10 response.

11 THE COURT: Right. All right. Well, I'm going --

12 MR. BURKE: The stay motion may be more urgent
13 than others. But --

14 THE COURT: Okay. Well, first the motion to
15 withdraw the reference has to be filed before you can ask me
16 to stay doing anything while it's filed. So I think I'm
17 just going to wait and see. And to the extent that --

18 MR. BURKE: We will notice it out then under the
19 regular -- the Court's protocol and Lehman's protocol
20 (indiscernible) motions in this case.

21 THE COURT: Okay. So you're not going to be
22 seeking short notice.

23 MR. BURKE: Correct.

24 MR. COSENZA: We may -- obviously, Your Honor,
25 we'll look at their papers. If we need additional time,

1 we'll --

2 THE COURT: Sure.

3 MR. COSENZA: -- see how it plays out.

4 THE COURT: Right. First choice is that you work
5 it out.

6 MR. COSENZA: Yes.

7 THE COURT: But then to the extent that you're not
8 even -- if I'm not physically here, I'm reachable.

9 All right. Mr. Cosenza, do you want to take a
10 minute? 'Cause I still see Mr. Kantor talking and I'm not
11 yelling at him but I ordinarily would.

12 MR. SHALOUB: I think I could ask the questions --
13 I'm sorry, Your Honor. Paul Shaloub for Willkie Farr. I
14 could ask at Mr. Kantor's request that we now take a break.
15 He's inquiring as to whether or not the motion for
16 abstention, if they're going to make that request in this
17 court or in the district court.

18 MR. BURKE: The motion to withdraw the reference
19 will be made in this court and transferred to the district
20 court.

21 THE COURT: Yes. He's asking with respect to the
22 motion for abstention. That's --

23 MR. BURKE: Well, that will be part of the motion
24 to dismiss. It will be wrapped into the motion to dismiss.

25 THE COURT: That's filed here.

1 MR. BURKE: Yes.

2 THE COURT: Right.

3 MR. COSENZA: Thank you, Your Honor.

4 THE COURT: Any other lessons today on motions
5 that can be filed? All right. Thank you all very much.

6 (A chorus of thank you)

7 THE COURT: We'll enter the -- as a housekeeping
8 matter, Mr. Cosenza, we need to enter the sealing order,
9 right?

10 MR. COSENZA: Correct. Do you need a copy?

11 THE COURT: Do we have that?

12 MR. COSENZA: I have a copy.

13 THE COURT: We need --

14 (Pause)

15 THE COURT: Do we have a Word version -- you have
16 to send Kevin a Word version.

17 MR. COSENZA: Okay. I'll send him --

18 THE COURT: Okay. Okay.

19 All right. I think that brings us to Moore Macro.

20 Two bottles of water, Mr. Tambe? Really? Does
21 one have scotch in it maybe or vodka.

22 MR. TAMBE: I might wish it had scotch in it.

23 THE COURT: Okay. I want to make a preliminary
24 statement. My preliminary statement is that this situation
25 is pretty out of control. And the papers from time to time,

1 this time, take on ad hominem type characteristics and I
2 don't like that at all. I believe that there were things
3 that were said in various letters that shouldn't have been
4 said. And I think that the papers reflect an escalation of
5 hostilities that I really want to stop and reverse. And I
6 want to get this on a constructive path that has one goal
7 which is to resolve the claim. That's it. Okay?

8 The way that I see these claims is I think maybe
9 differently than -- well, the way I see it is as follows.
10 There is alleged a series of transactions, assignments,
11 setoffs. It now seems to be the case that the position
12 being taken by Moore Macro is that there was an oral
13 assignment. That seems to be where things have settled.

14 The threshold question that we've talked about for
15 many months now in connection with the previous motions to
16 dismiss is whether or not what Moore Macro did was permitted
17 by the documents. We have to look at the timing of what was
18 done and we then have to compare it to what the document
19 allows. In other words, there is the question of whether or
20 not the seeming conflict between the -- Moore has no
21 affiliates language and the lack of a prohibition on
22 assignments. That's kind of the issues.

23 But then we've now gone into this whole set of
24 issues relating to replacement hedges and as soon as
25 reasonably practicable and Moore has taken the position that

1 an entire universe of Lehman documents ought to be
2 discoverable to -- in service of Moore's position that what
3 it did was just fine.

4 And, first of all, I think I disagree with that in
5 large measure. There is specific contractual language here.
6 And what Moore did or did not do is going to be determined
7 largely by reference to what Moore did or did not do and in
8 the time frame that it did it. And the vast volume of
9 transactions that Lehman touched in the days and weeks and
10 months that followed the filing, I'm not at all sure are at
11 all relevant to what Moore did or did not do.

12 And as a threshold matter, it seems to me we need
13 to focus on the very fundamental credit attacks of what
14 happened. We're zeroing in on that meeting. I don't
15 understand at this point what's going on with respect to the
16 whole subject matter waiver idea. The papers -- I'm very
17 confused after the last set of papers because before Moore
18 Macro's last papers came in, it seemed that the parties were
19 narrowing the scope in light of the representation that it
20 was an oral assignment. There was a sentence that said an
21 assignment need not be written and indeed here it was oral.
22 So then it seems that that teed up the issue of -- you're
23 taking the position that it was an oral assignment and now
24 there was some discussion of the scope of the subject matter
25 waiver. And then Moore came in and said hold on, not so

1 fast. That would be an advisory opinion. You can't make us
2 do anything. And at that point, I got completely confused.

3 So my view is we have to focus discovery right now
4 on what happened. You have to find out what happened. So
5 I'm just trying to reset everyone's expectation.

6 So I'm happy to hear you. I want the conversation
7 to be civilized and civil and to try to work toward the goal
8 of moving this forward.

9 If what the parties expect is that I'm going to
10 write a 100-page decision on cross-motions to compel, that's
11 not happening anytime soon. So I'm happy to preserve
12 everybody's rights and they are your rights under the
13 Federal Rules of Civil Procedure or otherwise. But I also
14 would like to not stop this litigation in its tracks when I
15 think the issues actually are pretty narrow. I think the
16 issues are pretty narrow. We have to find out what
17 happened.

18 Who wants to speak first? Mr. Tambe?

19 MR. TAMBE: Your Honor, let me start with where
20 you ended up which was what happened and the October 3rd
21 meeting. And I can understand your confusion about where
22 things are on subject matter waiver because we think they
23 squarely put the issue before the Court. The footnote that
24 they -- and let's take a step back.

25 I mean, they make it sound like this was always

1 known. It's been some revelation in the course of discovery
2 that, in fact, there was no assignment agreement that was
3 effective and in place when LBS filed for bankruptcy.
4 That's a fairly important fact.

5 THE COURT: Well, they might -- I don't want --
6 they're going to disagree with you. I mean, they're going
7 to disagree with you. They're -- "effective", the word
8 "effective". Okay? They're going to disagree with you.

9 MR. TAMBE: And that's why I said signed and
10 effective because there was no writing. What now seems to
11 be clear is that there was no writing.

12 THE COURT: Right. But that -- now we're getting
13 to the real meat of it.

14 MR. TAMBE: Right.

15 THE COURT: Right? So if the position is there
16 was no writing by 5:56 on the day in question, right, then
17 the question becomes we get discovery on what happened at
18 the meeting. And then what?

19 MR. TAMBE: So --

20 THE COURT: And then what? And then the privilege
21 log reflects entries that seem to describe a lot of stuff
22 that happened afterwards. So is it Moore Macro's position
23 that all Lehman gets to do is to ask people who were at the
24 meeting, hey, what happened at the meeting, and they all
25 say, oh, there was an oral assignment. That might be. But

1 then Lehman doesn't get to inquire about anything that
2 occurred afterwards or, frankly, anything that occurred
3 before when -- because if that's -- if that's the result,
4 it's a short case because -- on the issue of assignment and
5 setoff. Because I think what your -- your position is that
6 it happened at that meeting, it all happened at that
7 meeting, it was effective at that meeting, and no matter
8 what happened afterwards or before has any bearing on that.
9 And if I believe the witnesses, it's the end of the story.
10 And that just can't be right when there's a clear record
11 that there exist communications on that very -- on that
12 topic. That's what's reflected in the privilege log. So in
13 my view, it can be that it's that day, what they say is what
14 they say and that's the end of the conversation.

15 So I need to hear from you on how you think this
16 ought to go because I don't think that you can cabin that
17 day and then just say everything else is out of bounds
18 including a subsequent communication where somebody says,
19 hey, we didn't really come to a firm conclusion at that
20 meeting. I think we ought to document this. I'm making it
21 up. I obviously have no idea. I have no idea. But that's
22 the starting point before we even get in the same county as
23 all the issues about, hey, let's look at everything that
24 Lehman's got.

25 And then just to really kind of share with you my

1 view of it, and you can convince me otherwise, and then you
2 have everything that -- the construct that everything that
3 needed to happen happened on that day. And at the same
4 time, in the next breath, as soon as reasonably practicable
5 means not for eight months. So those are like the bookends.
6 Everything that needed to happen happened on that day before
7 -- it was not a violation of the automatic stay, was
8 consistent with the documents, et cetera, and valid under
9 applicable law. And as soon as reasonably practicable to
10 deliver the valuation statements wasn't for eight months.
11 So those are the two things. And that's kind of where the
12 action is.

13 Similarly, with respect to this issue -- I'm
14 similarly confused about the bid and the ask on the
15 replacement hedges. There's a statement that only one
16 replacement hedge was entered into. And then there was a
17 long, long argument in the latest pleading that says it
18 would be completely unfair to make us have to identify
19 replacement hedges because it was Lehman. Who knows? So
20 that seems to be kind of a backing away from saying that
21 there was only one replacement hedge.

22 So I've said a lot. I'm perfectly happy to hear
23 everything that you have to say. Mostly, I want you to say
24 things that help us come to a resolution if we can't -- I'll
25 decide it, obviously, but my first choice is to come to some

1 kind of a resolution.

2 So why don't you speak first to the subject matter
3 waiver issue as it's come to be called?

4 MR. GROOTHUIS: Sure. So with respect to subject
5 matter waiver, our position is and has always been that
6 there was an oral assignment effected prior to the
7 bankruptcy on October 3rd, 2008. And we were prepared to
8 waive privilege as to the facts and circumstances
9 surrounding that assignment which does include later
10 conversations about everything that happened back then. But
11 the position that Lehman has taken is that any subsequent
12 conversation about the assignments, whether or not related
13 to the events of that day, would be covered by the subject
14 matter waiver. In other words, a conversation that I might
15 have today with the client that happens to mention --

16 THE COURT: Let's not talk about today.

17 MR. GROOTHUIS: -- the word "assignment".

18 THE COURT: Let's talk about prior to the deliver
19 of the valuation statements. Let's talk about that day.

20 MR. GROOTHUIS: Okay. So --

21 THE COURT: Okay? But you're choosing your words
22 very carefully, right? You're talking about what happened
23 that day, right? But I'm not going to limit it to just,
24 hey, that was a great meeting. I mean, to the extent that
25 there were subsequent communications generally about the

1 assignment and the setoff, why shouldn't those be
2 discoverable? You say that everything that needed to happen
3 happened that day before 5:56. Everything's good. But
4 then, subsequently, there's all these communications that
5 occurred that may take a -- that may shed light on your
6 characterization of what occurred in that meeting whether or
7 not they refer to it. Hypothetically, if there's a
8 communication that somebody says, you know -- I'm not going
9 to give you an example.

10 MR. GROOTHUIS: And if the distinction is what
11 happened at that meeting versus what shed light at the
12 meeting, we're not going to quibble over issues like that.
13 I'll tell you what the entries on the --

14 THE COURT: No. But you're -- again, you're
15 choosing your words very carefully which I know you're paid
16 very well to do. And I'm not criticizing you for it. But
17 it's not about what happened at the meeting. It's about the
18 assignment and the setoff which you say -- which you say
19 occurred orally at that meeting. Right? So it's not about
20 just documenting it. It's about evidence, communications,
21 that bear on the assertion, not what happened at the
22 meeting, the assertion that there was an oral assignment.
23 So I think it's broader than what you're articulating. I
24 don't agree with Lehman that it goes through 2014. I don't
25 agree with that. But it's -- but the basics are broader

1 than what you say.

2 MR. GROOTHUIS: And --

3 THE COURT: So --

4 MR. GROOTHUIS: Okay.

5 THE COURT: -- I don't know if you're
6 intentionally choosing those words or not.

7 MR. GROOTHUIS: What I'm draw the distinction
8 between is there are subsequent entries on our privilege log
9 that go through the date of the delivery of the last
10 valuation statement --

11 THE COURT: Right.

12 MR. GROOTHUIS: -- which I believe was in August
13 of 2009.

14 THE COURT: Right.

15 MR. GROOTHUIS: And under Lehman's argument with
16 respect to the waiver which is that every document that so
17 much as mentions the word assignments is -- the privilege is
18 waived. So, for example, we had valuation statements that
19 were prepared in draft form. And the draft of which there
20 are many that happen to mention the assignments 'cause
21 they're referenced in the valuation statements, those would
22 all be, under Lehman's theory, the privilege as to those
23 documents would be waived and they would be picked up in the
24 scope of this. And that has nothing to do with

25 THE COURT: Okay. That's a good --

1 MR. GROOTHUIS: -- what did or did not happen --

2 THE COURT: Okay.

3 MR. GROOTHUIS: -- at the October 3rd meeting.

4 THE COURT: That's a fair point.

5 MR. GROOTHUIS: Okay.

6 THE COURT: Okay.

7 MR. GROOTHUIS: So, I mean, that's the vast, vast
8 majority of the entries on the privilege log that refer to
9 assignments.

10 THE COURT: Well, let's look at the privilege log.

11 MR. GROOTHUIS: Sure.

12 (Pause)

13 THE COURT: See, the problem is that if you just
14 start with, say, log number 19 -- actually, the logs are all
15 over the place, I guess because it goes by date. If you
16 start with the October 3rd e-mails on page 5 of the log and
17 you continue.

18 MR. GROOTHUIS: Sorry. I'm just trying to get to
19 where you are.

20 THE COURT: Sure. I'll wait for you.

21 MR. GROOTHUIS: It's page 5?

22 THE COURT: I'll wait for you to get there.

23 MR. GROOTHUIS: Yeah. I'm on page 5 in --

24 THE COURT: Yeah. So if you just -- if you page
25 through the entries after that, and then we get to the ones

1 where it says it lacks metadata, there's no indication for
2 these that these e-mails have to do with valuation
3 statements.

4 MR. GROOTHUIS: And that's correct. So the
5 immediate aftermath of the October 3rd meeting involves some
6 e-mails relating to the events of that meeting as to which
7 we would be waiving privilege, and other e-mails that relate
8 to legal advice about the validity of assignments whether
9 they take place pre-petition or post-petition. And in our
10 view, that's a legal question. And the legal advice that
11 Moore took is either right or it's wrong but the Court is
12 ultimately going to decide that question.

13 THE COURT: Right. But if -- so I'm going to give
14 you a hypothetical. Again, I have no idea what occurred.

15 MR. GROOTHUIS: Sure.

16 THE COURT: Okay? So Moore gets advice that in
17 order to fully realize the value of the setoff claim, you
18 have to do some assignments. Okay? And everyone gets
19 together on October 3rd and they agree around the table,
20 let's do assignments, and everyone says okay. And then
21 subsequent to that, Moore is informed that doesn't really
22 work. Right? That doesn't really work. And then begins to
23 prepare documents in order to document the assignments that
24 they've now been told don't really work. What about that?

25 MR. GROOTHUIS: So --

1 THE COURT: Is that --

2 MR. GROOTHUIS: If that advice is correct, then
3 the assignment either happened on the 3rd of October or it
4 didn't. And any subsequent documentation that they would
5 have done made no difference. And so that touches the point
6 I was trying to make earlier which is if the legal advice
7 whatever you did -- whatever happened on that day is going
8 to be determinative of whether the assignments were valid or
9 not. Their contention is it's not valid. But that's all
10 going to be based on what happened at that meeting. And so,
11 whatever legal advice they took in 2009 or -- through today
12 about here are the things that needed to have been done to
13 make it effective, to our way of thinking, that's legal
14 advice and it doesn't relate to the fact of the assignment.
15 And if they want to make their arguments --

16 THE COURT: But what do I do about the potential
17 credibility issue when I have somebody saying, oh yes, we
18 effected assignments that day and then there appears to have
19 been an enormous amount of communications and documentations
20 back and forth that, at a minimum, call into question the
21 credibility of -- I don't know any of these people, I have
22 no idea what the facts are. I'm just trying come to a fair
23 resolution of understanding what occurred. Obviously,
24 people continue to talk about assignment and setoff after
25 the meeting. And it seems to me fair game for counsel to be

1 able to understand, well, what was all of that about.
2 Otherwise, how do I assess the credibility of the statement
3 that, yes, all the assignments took place in the meeting?
4 You got to help me on this.

5 MR. GROOTHUIS: The only suggestion I have -- I
6 think Your Honor can make that determination based on the
7 credibility of the witnesses because the assignments, as I
8 mentioned earlier, either did or did not happen that day.
9 And I personally don't see what relevance later legal advice
10 might have based on the completion of an assignment on that
11 day. But if Your Honor wants to take a look at these
12 documents in camera and decide which ones, in fairness,
13 ought to be included within the scope of the waiver in order
14 to make it not prejudicial to the other side, we're happy to
15 go with that move. I mean, that's -- if you're looking for
16 a suggestion as to how to proceed, that would be my
17 recommendation.

18 MR. TAMBE: Can I just speak to that --

19 THE COURT: Mr. Tambe? Sure.

20 MR. TAMBE: Just on that one issue. I think just
21 the phrase used by counsel is whether they were seeking
22 legal advice. I think there's more to it than that. So
23 again, hypotheticals, right? They go out and ask outside
24 counsel to opine on something. We do want to get the facts
25 that were provided to outside counsel which may be reflected

1 in outside counsel's letter back or communication back
2 saying you've told us the following. Based on the
3 following, we give you the following conclusions. There's
4 two parts of that legal opinion. The first part of that
5 legal opinion we believe is squarely within subject matter
6 waiver because it goes to credibility. That's how I cross-
7 examine their people. What were you telling your lawyers
8 about what really happened at that meeting? I should have -
9 - there should be no dispute as to subject matter waiver on
10 that point.

11 What the lawyers, the outside lawyers, then
12 concluded, they said, well, based on this set of facts, it
13 is our legal opinion x, y and z then goes to your point
14 which is based on that can say, well, you know what, you've
15 got to have that in writing. And the process then gets
16 underway to document this agreement. And those kinds of
17 communications, Your Honor, could have happened even after
18 2009. 2010, 2011, someone starts drilling in on these
19 assignments and says what really happened here. And facts
20 are relayed by people who were participants in that October
21 3rd meeting.

22 THE COURT: But ultimately, the agreements were
23 ultimately -- I mean, there start to be draft assignment
24 agreements, right?

25 MR. TAMBE: But -- they start to be. But I think

1 where we are in this case now is how ever perfect those
2 assignment agreements are, we know one thing about those
3 written assignment agreements. They are after October 3rd.

4 THE COURT: Sure. We know that.

5 MR. TAMBE: Right. So the only thing that they
6 can rest their case on now is that there's a fully formed
7 oral -

8 THE COURT: That's right.

9 MR. TAMBE: -- effective agreement. Right?

10 THE COURT: Right.

11 MR. TAMBE: That's a high burden in any case where
12 it's going to be entirely based on oral testimony of --

13 THE COURT: But -- okay. But that's why I go back
14 to -- but that's why the whole story needs to be discerned
15 here because you're saying it was fully formed in that
16 meeting. Everything was done. But there's this -- all of
17 this other stuff that occurs afterwards that has to be
18 relevant to -- and ought to be discoverable notwithstanding
19 an assertion of privilege to find out what actually
20 happened.

21 MR. GROOTHUIS: And we're prepared to give all
22 that. I mean, to take Mr. Tambe's example, if there was a
23 communication to a lawyer after October 3rd saying here's
24 what we did that day, you tell us whether it was right or
25 not. That relates to the facts and circumstances of that

1 October 3rd meeting. That would be within the scope of the
2 waiver. And our position is whatever the lawyer came back
3 with, it was -- now that it wasn't valid, is legal opinion
4 and advice. And it doesn't bear on the factual question of
5 whether the assignments were done that day. There was an
6 oral assignment. That's always been our position. And
7 under the law, an oral assignment is every bit as good as a
8 written assignment. So this Court can determine based on
9 the testimony of the witnesses and whatever documents refer
10 to what happened that day, whether those assignments were
11 complete, and that's how we do the scope. But as I said
12 before, Your Honor --

13 THE COURT: How does he cross-examine your
14 witnesses?

15 MR. GROOTHUIS: He's going to be able to talk to
16 everybody who was in that room, including lawyers, and ask
17 who said what to whom. And if there were later
18 communications that refer to what happened that day, he's
19 going to get all those as well. That gives him all that he
20 needs to cross-examine the witnesses and make whatever
21 arguments he wants to as to the effect that these
22 assignments didn't happen that day. But what he's asking
23 for -- and I think Your Honor has recognized it, it can't be
24 as broad as what they're suggesting which is it goes through
25 today. And not just what happened with respect to these

1 assignments but any documents that mentions.

2 THE COURT: Is there an outside date -- have the
3 actual written assignments been produced?

4 MR. GROOTHUIS: Yes.

5 MR. TAMBE: Yes.

6 THE COURT: Plan purchase agreement. And what
7 dates are on them?

8 MR. TAMBE: I don't think --

9 UNIDENTIFIED SPEAKER: We have a signoff on the
10 agreement but not the drafts.

11 THE COURT: What's the final date?

12 MR. TAMBE: Well, the final date says on it -- and
13 it's a curious choice of words. But it says on it -- let me
14 make sure I -- it starts off by saying "This Agreement is
15 entered into by the signatories hereto and is effective the
16 3rd day of October, 2008." Can I hand this up?

17 THE COURT: Sure.

18 MR. TAMBE: Because -- so that's what the written
19 agreement says.

20 THE COURT: But is there metadata that shows --

21 MR. TAMBE: No, there's not.

22 THE COURT: Why not?

23 MR. TAMBE: And let me ask that. And, by the way,
24 this is going back to what you talked about a couple of
25 matters ago, it's a curious choice of words. When we talk

1 about the agreements that are entered as of a particular
2 date, we say an agreement is entered as of. And one of the
3 things the readers, it wasn't actually entered on that day;
4 it was entered as of that date. This makes it -- makes one
5 reach the conclusion that, in fact, it was entered into on -
6 - executed on October 3rd when we now know it wasn't. It
7 was done weeks, if not months, later. And this is the only
8 document we had to go on until discovery began in this case
9 as to -- and the signature block is undated on the
10 agreement.

11 MR. GROOTHUIS: To be clear, so there's an e-mail
12 in which includes the word "document" that was circulated on
13 October 3rd that is the Word version of this agreement that
14 was not signed. There is subsequent written -- excuse me.
15 There's a subsequent signed version of the agreement. And
16 we don't dispute that that written signed agreement was not
17 signed until after the 3rd of October. So whether it was
18 done a day later, a month later or a year later, it's course
19 petition. But that document is memorializing the
20 assignments that occurred at this meeting that we've been
21 discussing. So it does appear --

22 THE COURT: I'm sorry. Can you say that again?

23 MR. GROOTHUIS: Sure. The written -- I can't tell
24 from this slide whether this is the Word document that was
25 attached to an e-mail which has a time on it that was

1 circulated on October 3rd, 2008 or this is the signed
2 version of the agreement which had been produced in
3 discovery. It was a hard copy that was scanned.

4 MR. TAMBE: Right. So we don't have the e-mail
5 from October 3rd because we've claimed privilege over it.
6 What we have is the signed scanned pdf document not the Word
7 document.

8 MR. GROOTHUIS: Okay. So then this is the scanned
9 version -- the signed version.

10 MR. TAMBE: It's the signed version.

11 MR. GROOTHUIS: Okay. I thought I heard you say
12 it was.

13 THE COURT: No. It's a signed version. The point
14 is that -- yes. It's the signed version.

15 MR. GROOTHUIS: Okay.

16 THE COURT: But I go back to the privilege log and
17 days after that, there continues to be e-mail traffic back
18 and forth concerning assignments and setoffs.

19 MR. GROOTHUIS: Right.

20 THE COURT: Right? So if the position is that
21 everything was said and done on the 3rd and there continues
22 to be e-mails -- I mean, when something's done, as you said,
23 it's done. But here, people kept talking about it. So then
24 in order to test the assertion that it was done and
25 effective on October 3rd, it seems appropriate that these e-

1 mails subsequent that refer back not only to the meeting but
2 to the assignments ought to be produced so that there's a
3 full picture of what occurred. If there were indisputably a
4 written agreement that was dated, just to make it easy, on
5 October 2nd, we wouldn't be here. We wouldn't be here. But
6 it's not because you're taking the position that it was an
7 oral assignment and a setoff -- and a setoff, right? Right?
8 No?

9 MR. GROOTHUIS: Well, the assignment is done at
10 the October 3rd meeting.

11 THE COURT: Right?

12 MR. GROOTHUIS: Right.

13 THE COURT: Right.

14 MR. GROOTHUIS: So with respect to the later e-
15 mails that refer to the assignments, our position is that if
16 those documents refer to whether the assignments happened or
17 not --

18 THE COURT: Okay.

19 MR. GROOTHUIS: -- then they're entitled to those
20 and they will get those. This is part of the scope of the
21 waiver. If they reflect legal advice about the timing as to
22 which an assignment would have been permissible versus not,
23 i.e.,
24 pre-petition versus post-petition, that is legal advice
25 disconnected from the facts of what happened and we don't

1 think that's covered by the waiver. But if Your Honor has
2 concerns about that --

3 THE COURT: But what if the legal advice says --
4 again, just to give an extreme example, the legal advice
5 says I told you that an assignment was -- an oral assignment
6 was ineffective. What if it said that? Right? Isn't that
7 something that everyone ought to know?

8 MR. GROOTHUIS: I don't think so because if that's
9 accurate advice then that's a legal question that the
10 Court's going to rule on. And so, if the assignment was
11 done orally and it turns out that an oral assignment is
12 invalid then whether the legal advice said that later or it
13 said the opposite later doesn't bear on whether the
14 assignment was orally conveyed. The issue that they want to
15 challenge --

16 THE COURT: But if the issue -- if it then becomes
17 that assignment wasn't effective and now there's an
18 automatic stay in place and things flow from that, it --
19 look, I respect the attorney/client privilege entirely. But
20 this has been placed in issue because of the particular
21 position that Moore Macro is taking. And in order to have a
22 determination on that matter, we need to know what happened.

23 So if you want to do this by -- half by agreement
24 and half by in-camera review, I'll do it that way. If we
25 want to agree to do it in stages, I'm not going to give Mr.

1 Tambe discovery through 2014 right now. If something
2 emerges in a first or second round of review that indicates
3 that the -- you know, the never-ending story that for
4 completeness sake would require that there be subsequent
5 deduction then we can go there. But I think the only way to
6 get through this difficult situation is in little steps. So
7 the first little step is whatever you agree to, we'll do.
8 Whatever I can then review in-camera, I'll do. And then it
9 would be without prejudice to Mr. Tambe's ability to say
10 that's not enough and your ability to say it is enough.

11 MR. GROOTHUIS: Okay. So just -- so to be -- so
12 I'm following correctly --

13 THE COURT: Yes.

14 MR. GROOTHUIS: -- we will produce documents that
15 --

16 THE COURT: Why don't you articulate -- I don't
17 want to be -- you suggested in your papers that if I were to
18 say anything about a subject matter waiver, I would be
19 rendering an advisory opinion. I don't want to do that.
20 What I'm asking you is that to the extent that you ca
21 articulate, at least for a first stage, reserving all of
22 your rights, an agreed scope of a -- call it a subject
23 matter waiver or just call it documents you're willing to
24 produce, articulate that, and then describe the set of
25 documents that you are -- that you will submit to me for in-

1 camera review and then we'll go from there.

2 MR. GROOTHUIS: So the documents that we would
3 produce, we've articulated that population documents -- it's
4 in our papers. It was the same subject of the stipulation
5 that we've been negotiating for a long time. This got
6 started with Lehman asking us whether we were intending to
7 waive privilege. And so, in order to avoid this very fight
8 that we're having right now where we say here's what we're
9 willing to waive and they say they want the sun, the moon
10 and the stars, we try
11 to -- I'm sorry. I'm mindful of the Court's admonition at
12 the beginning and I'm going to take it to heart.

13 THE COURT: So just --

14 MR. GROOTHUIS: We tried to work this out.

15 THE COURT: So let's just make it part of this
16 record. If you can read from your papers or from Lehman's
17 papers or somewhere --

18 MR. GROOTHUIS: Sure.

19 THE COURT: -- so that we have it --

20 MR. GROOTHUIS: I'll show you where it is. It's
21 the same language in the stipulation that we've been
22 circulating. And --

23 THE COURT: It's in which document? Do you
24 remember?

25 MR. GROOTHUIS: It is --

1 THE COURT: It's the --

2 MR. GROOTHUIS: Most recently, it was in --

3 THE COURT: The memorandum of law in opposition to
4 the motion to compel?

5 MR. GROOTHUIS: Yeah. I think it would be there.
6 Let me just find that.

7 THE COURT: 16 and 17?

8 MR. GROOTHUIS: Yes. So on page 17, there's a
9 paragraph that starts with "Consistent with this authority"
10 -- and we submitted a proposed order. So it's the same
11 language that's been in the stipulation that's on page 17 of
12 our opposition to the motion to compel and it's in the
13 proposed order. So what I would propose then is we'll go
14 ahead and produce what we think we ought to produce. We'll
15 make our witnesses available. They will answer all the
16 questions that are subject to that waiver scope. And if
17 Lehman wants to come back and suggest that there was
18 additional material that they weren't given access to that
19 they ought to have been given access to, hopefully that will
20 be a limited population of information. And we'll come back
21 --

22 THE COURT: Okay. But let me focus on this. I
23 have a number of questions. One is, I'll ask Mr. Tambe, the
24 date starts with October 2nd.

25 MR. TAMBE: Yeah. But that's -- it only pretends

1 to start on October 2nd. If you look at the numbers, in
2 fact, the log entries that are dated October 2nd are not
3 included in that list. So if you want to have their list
4 next to our appendix, we can go through the numbers. So the
5 numbers --

6 THE COURT: But is it -- So this wasn't the way --
7 this wasn't the way I was thinking about it. I don't know
8 why -- as a preliminary matter, I don't know why it starts
9 on October 2nd. Why doesn't it go back before October 2nd?

10 MR. GROOTHUIS: You talking about the proposed
11 order?

12 THE COURT: Well, I'm not thinking of it in terms
13 of a proposed order. I'm trying to articulate a scope. And
14 to me, this again, is too narrow because it's not just about
15 the facts, circumstances and events leading to or at the
16 October 3rd, 2008 meeting. It's relating to the assignment.

17 MR. GROOTHUIS: So I think it's because the
18 concept of the assignment was never raised prior to October
19 2nd. And I'm looking at the log entries. And the issue of
20 assignments did not come up until October 2nd. And that's
21 why October 2nd
22 is --

23 THE COURT: Okay. Hold on. Let me get back to
24 the log.

25 MR. GROOTHUIS: Let me do it myself.

1 THE COURT: Well, are you representing that the --
2 a series of e-mails begins on the 22nd, 23rd relating to
3 ISDAs and setoff. So that -- those log entries mean what
4 they say, that there was nothing in there that relates to
5 assignment.

6 MR. GROOTHUIS: That's my understanding but I'm
7 happy to go back --

8 THE COURT: If you could --

9 MR. GROOTHUIS: -- and confirm those log entries
10 to make sure that they don't.

11 THE COURT: Right. Because I noted that
12 difference. Because then beginning on -- you're quite
13 right. On October 2nd is the first time someone talks about
14 assignment.

15 MR. GROOTHUIS: So we'll go back and take a look.

16 THE COURT: Right. I know exactly what you're
17 going to say, Mr. Tambe --

18 MR. TAMBE: Yes.

19 THE COURT: -- but you can say it anyway. Go
20 ahead.

21 MR. TAMBE: I might surprise you, Judge. So
22 clearly, our argue is -- it goes back to the 22nd. We noted
23 those. But let's even talk about the entries that they seem
24 to be with us on, right? The October 2nd entries, they say
25 -- well, they agree to the time period being October 2nd

1 onwards to 2009.

2 THE COURT: And --

3 MR. TAMBE: But then they're not giving us those
4 entries from October 2nd. Page 4 of our appendix. That's -
5 - looks like a series of e-mails that lead up to this
6 meeting on the 3rd.

7 THE COURT: Right. But so my view is that every
8 communication that deals with an assignment either ought to
9 be produced or given to me for in-camera review. That's my
10 view. So from -- you're going to confirm that the documents
11 prior to October 2nd, in fact, only relate to general issues
12 regarding ISDAs and setoff and don't deal with assignment in
13 any way. And then from October 2nd, at least for the time
14 being through August 25th, 2009, you're either going to
15 produce everything that relates to assignments or you're
16 going to give it to me for in-camera review to the extent
17 that you believe it fits within your category of the after
18 the fact legal advice that wouldn't have any bearing.

19 MR. GROOTHUIS: Okay.

20 THE COURT: And so the way -- so the next sentence
21 in that paragraph on page 17 that says "Because documents
22 13", et cetera, et cetera meet these criteria, I'm not
23 following those criteria. I just established the criteria.
24 Right? And I'm also not limiting it to the drafting,
25 execution, recording, completion and perfection. It's just

1 relating to the assignment. Just relating to assignment or
2 -- I don't want to get caught by a definite article. I
3 spent three hours yesterday hearing about the lack of a
4 definite article. So assignments -- the assignments.
5 Right?

6 MR. GROOTHUIS: Yes. I understand.

7 THE COURT: Okay.

8 MR. GROOTHUIS: So --

9 THE COURT: So we can turn then -- the Court
10 originally started by referring to the assignments that why
11 are we asking or why are we having a dispute about the
12 valuation documents. And if the claims related only to the
13 assignment and setoff, I would agree with you. There would
14 be no reason for us to be asking about valuation related
15 documents. But they do have claims. And frankly, the value
16 of those claims far outweighs the issue in terms of monetary
17 value of the assignments that what was paid was undervalued.
18 And therefore, they're challenging the valuations for these
19 terminated transactions. And so, our position is if they're
20 going to put the valuations at issue, then the documents
21 that are in their files that relate to the valuations, be
22 they Lehman's internal valuations or valuations that they
23 received on other counterparties for these same transactions
24 --

25 THE COURT: But wait. You just -- you left the

1 station without telling me. Okay? I'm not doing that yet.

2 Okay?

3 MR. GROOTHUIS: Okay.

4 THE COURT: We're still on the documents to be
5 produced by Moore Macro --

6 MR. GROOTHUIS: Okay.

7 THE COURT: -- side of things. Okay? So right
8 now we have a first round game plan. And I don't put words
9 in your mouth. But if you're doing it not by agreement or
10 if you're doing it -- if I'm ordering it over your
11 objection, we ought to make that clear because you want to
12 preserve your rights. So I just want to have clarity on the
13 basis on which we're proceeding.

14 MR. GROOTHUIS: Okay. So --

15 THE COURT: Okay. So solely with respect to the
16 assignment related documents that we've just described are
17 going to be produced.

18 MR. GROOTHUIS: Right.

19 THE COURT: Is that our agreement or is that what
20 I've ordered you to do?

21 MR. GROOTHUIS: So what we can agree to is what we
22 put in our papers, the proposed order. And if Your Honor is
23 proposing to proceed the way you suggested, we will -- we do
24 object to that because we think that anything beyond the
25 fact and circumstances of that meeting is irrelevant. But

1 we'll comply with the order and we will submit them for in-
2 camera review.

3 THE COURT: Okay. So -- and what I'm trying to do
4 is preserve your rights for any subsequent appeal. We get
5 to the end of the day. Mr. Tambe shows a witness a
6 document. The whole case turns on that document. You then
7 get to say on appeal that document shouldn't have been
8 produced. That's all I'm trying to do is to preserve your
9 rights.

10 MR. GROOTHUIS: Okay.

11 THE COURT: -- and have you never say that I
12 didn't preserve your rights. So are we clear? Are we good
13 on that point?

14 MR. GROOTHUIS: Yes.

15 THE COURT: Okay. Now let's talk about
16 replacement hedges. Okay? And I don't have clarity on what
17 your position is. So first, your position seemed to be
18 there was only one replacement hedge. Then the position
19 seemed to be it's asking the wrong question. We could never
20 identify all of the replacement hedges. And then that led
21 me to begin to wonder whether I really understood if you
22 both were talking about the same thing when you talk about
23 replacement hedges. So to me, replacement hedges are
24 absolutely relevant. They're absolutely relevant. And
25 Lehman's entitled to know whether you entered into

1 replacement hedges. It's no more complicated than that.

2 But it seems to have become more complicated. So why don't
3 you talk about that one?

4 MR. GROOTHUIS: Sure. So on replacement hedges,
5 we respectfully disagree. We think that the definition of
6 loss provides that a party may calculate its losses by
7 reference to quotations that they've obtained from leading
8 dealers in the market. And that's what Moore did. And the
9 quotations that Moore obtained from leading dealers in the
10 market reflect the replacement value because you're getting
11 a quote from somebody who would step in on Lehman's side of
12 the trade. And so what Lehman is saying is, the quotes that
13 you obtained from these leading market dealers are
14 unreasonable. The only reasonable quotes you could have
15 used are these mid-market end-of-the-day prices at which --
16 and our position with respect to those is we could have
17 never transacted at those prices.

18 THE COURT: Sure.

19 MR. GROOTHUIS: And the price at the end of the
20 day --

21 THE COURT: Right.

22 MR. GROOTHUIS: -- on one of the most volatile
23 days in market history is going to look very different from
24 the price that you obtained at 1 p.m. that day.

25 THE COURT: Okay.

1 MR. GROOTHUIS: Okay.

2 THE COURT: But that's what a trial is about,
3 right?

4 MR. GROOTHUIS: Right.

5 THE COURT: Okay. But right now it seems to me
6 that you don't get to arbitrarily say what you just said and
7 please ignore the fact that five minutes later -- I'm
8 obviously exaggerating -- five minutes later despite the
9 fact that we got those quotations, we entered into these
10 replacement hedges. If you entered into the replacement
11 hedges, let's know what they are. And you can still
12 maintain that the right way to calculate your loss is with
13 regard -- using the quotations that you got. The way I read
14 your papers was you're telling me what's relevant and what's
15 not. It's discoverable. You then fully get to say at trial
16 or otherwise that -- you get to argue that it's not. But
17 they get to know because the -- they get to know in fact
18 what replacement transactions -- to your point, quotes are
19 great; transactions are better --

20 MR. GROOTHUIS: Okay.

21 THE COURT: -- in some instances. I don't know.
22 Right? What you just said was, sure, there were those
23 quotes. But we could have never transacted. Okay? But
24 what they're saying is, we're with you. You then
25 transacted. Show me the transactions. So, Mr. Tambe, maybe

1 you can say it differently but isn't that -- is that what
2 you want?

3 MR. TAMBE: That is exactly what we want. And
4 here's the point of confusion that we have from their
5 papers. This is page 11 of their opposition.

6 THE COURT: Yeah.

7 MR. TAMBE: So -- and it's the paragraph that says
8 "Given that" --

9 THE COURT: That --

10 MR. TAMBE: "Given that" --

11 THE COURT: That's the one that I didn't
12 understand.

13 MR. TAMBE: Right. Because but for that -- if all
14 they're saying is they had one replacement trade --

15 THE COURT: Right.

16 MR. TAMBE: -- and that's the only one, okay, it
17 addresses the discovery issue and we can move on. But they
18 seem to want it both ways. But they're saying, well,
19 there's only one replacement trade we're going to tell you
20 about but there may have been others. That's the problem.

21 THE COURT: Well, but then again, again to focus
22 on the choice of words which got me. This is the very
23 paragraph that got me confused. Because it says "may have
24 been entered into because of Lehman's collapse.

25 That strikes me as being broader than what we're

1 talking about, isn't it?

2 MR. TAMBE: It is.

3 THE COURT: Okay. In other words, lots of things
4 happened because of Lehman's collapse that were secondary
5 and tertiary to the trades that existed between these
6 parties. I'm talking about actual replacement hedges for
7 what we're talking about. Either you entered into them or
8 you didn't in this narrow period of time. So.

9 MR. GROOTHUIS: So like the issue that we have is
10 the way they defined the replacement hedges as capital R,
11 capital H. It's a defined term that they created. And what
12 they defined it as and I'm just pointing out that pension is
13 any trade that were an entry or were considered entered, the
14 considered entering into I believe the period was a stand of
15 three weeks.

16 And so our position is a transaction that happened
17 three weeks later at a different price and perhaps the
18 original terminated transaction may have been an oil crude
19 option that, you know, was going to settle in, let's say, in
20 December. And the subsequent transaction was a March crude.

21 Who is to say whether that was a replacement or
22 not if it was with a different maturity date and with a
23 different price? And so we're unable to determine based on
24 the definition of replacement trades what is and what isn't.
25 What we have said is in Ward's records there one trade is

1 recorded as a one for one replacement.

2 But what they're saying is give me three weeks of
3 your trade to get up and they'll -- I guess they're planning
4 to decide what is and what isn't a replacement trade. And
5 our position is that's irrelevant.

6 Indeed the example that Your Honor provided five
7 minutes later is a very different situation from three weeks
8 later and it's the three weeks later that they're asking
9 for.

10 THE COURT: If you were able to enter into a
11 replacement trade two weeks later and then in which you were
12 -- that was beneficial to you, right? Your position is that
13 the calculation of loss shouldn't take that into account?

14 MR. GROOTHUIS: Our position is we have on --

15 THE COURT: Bearing in mind that the valuation
16 statements weren't submitted until much later.

17 MR. GROOTHUIS: They were submitted later, but
18 they're as of the early termination date which is -- or
19 which is either September 15th or 16th --

20 THE COURT: Right.

21 MR. GROOTHUIS: -- depending on the month.

22 THE COURT: Right.

23 MR. GROOTHUIS: So we can't tell seven years later
24 what was in the trader's mind whether they entered into a
25 particular transaction two weeks later as a form for

1 replacement or a September 15th trade that was terminated.

2 There is no way for us to determine.

3 THE COURT: So -- Okay. So solve this problem
4 for me Mr. Tambe.

5 MR. TAMBE: Yeah. Can I speak to this, Your
6 Honor? We've been down this path. Not just with respect to
7 Lehman. I've been doing this for ten years.

8 Traders just don't trade on whims. Okay. They --
9 people have a very good idea of what their risk positions
10 are. And when Lehman happens that very good idea of how
11 we're going to manage that risk position. They don't just
12 roll the dice and say, hey, you know, we may enter two
13 trades today. Oh, I'm feeling lucky; I'll enter five
14 tomorrow.

15 When we talk about what -- that's why we phrased
16 it the way we did. These are extremely smart folks, right?
17 They know how -- they know their risk positions right down
18 to the penny. And they're managing that very carefully. We
19 need to cast a net in a broad way because they are 100
20 places that are going to go high.

21 Well, we didn't record it as a Lehman replacement.
22 We didn't say this was because of Lehman. When you imagine
23 the risk position, you terminate a Lehman that created a
24 certain new risk position. You took steps either for one
25 replacement or a portfolio replacement, you did certain

1 things to get back into your preferred risk position.

2 We want to call that replacement hedges, because
3 that's what you actually did to manage this risk, not the
4 bill you sent us nine months later. That's what I'm trying
5 to get at.

6 THE COURT: See that's the problem that -- that's
7 part of the problem that we have here is the gap between --
8 is the gap between when the terminations occurred and when
9 the valuation statements were sent. So that's one of the
10 issues.

11 MR. GROOTHUIS: I think that's a separate issue.
12 It doesn't --

13 THE COURT: It is --

14 MR. GROOTHUIS: -- relate to these replacements.

15 THE CLERK: -- a separate issue, but it
16 underscores the point that it's not inconsistent with the
17 fact that the valuation statements came months afterwards.
18 That things were happening that affected the valuation.
19 You're now saying that we got quotes; we were done. Okay.

20 If that's your -- if that's true, then that
21 creates another problem which is if that's true, why did it
22 take nine months to submit a valuation? That's -- there's a
23 logical inconsistency here. If what you're saying is it
24 went out without quotes that we were supposed to do -- done.
25 Then there's a problem because you didn't submit the

1 valuation statements.

2 Maybe, Mr. Tambe is going say yeah, you managed
3 the risk and through a series of trades in the coming weeks
4 you came out here and then you submitted a valuation
5 statement.

6 I have no idea. But it can't just be that it's
7 limited to the one trade that someone recorded as a direct
8 one for one. It has to be broader and again, it's not --
9 it's not forever. It's just in this period of time. And
10 it's -- you get to make all of your arguments. You get to
11 argue that it has nothing to do with the loss calculation.
12 But replacement hedges are relevant and they need to be
13 produced.

14 MR. GROOTHUIS: Okay. So then I think the
15 questions is what period of time are you ordering us to
16 produce statement?

17 THE COURT: Well, Mr. Tambe, why don't you explain
18 what date range you believe is the appropriate date range
19 and why.

20 MR. TAMBE: I need to confer the evaluation books
21 from the statement we -- we thought about the time period we
22 set forth.

23 THE COURT: Right.

24 MR. TAMBE: We set forth three weeks given what
25 the underlying order, how frequently they traded, et cetera.

1 So we are asking for three weeks. We don't financially --
2 this is a volume issue or a burden issue --

3 THE COURT: Right. If --

4 MR. TAMBE: -- they can make a great out about
5 it. They haven't.

6 THE COURT: Well, talk -- I mean --

7 MR. GROOTHUIS: We haven't. We've said it's
8 irrelevant and burdensome to produce three weeks of data,
9 especially when --

10 THE COURT: Okay. But I don't -- we've talked
11 about relevance. I mean relevance is my call. Right now I
12 think it's discoverable. Whether ultimately it is or is not
13 relevant remains to be seen. So right now I think it's
14 discoverable because it is potentially relevant. I don't
15 know.

16 But if we're talking about 100,000 trades, then,
17 you know, then it's a burden issue. But I have no idea. So
18 your position is that it is a relevance one and on that
19 basis, enter in the context of the discovery, I'm overruling
20 that and I'm saying that you need to produce them. All
21 right.

22 So if the point is that it's a 100,000 trades and
23 it's burdensome and will crash your system, that's something
24 you and Mr. Tambe can discuss.

25 MR. GROOTHUIS: Okay. Then I'll inquire as to the

1 issue around burdensome. How many trades we're talking
2 about and what it would take to recreate them and we'll
3 discuss it.

4 MR. TAMBE: That's fine. We can talk about that
5 too.

6 THE COURT: Okay. I'm stumbling on the word
7 "recreate". I don't -- I don't know what that means. I
8 don't want to grab further defeat from the jaws of victory
9 here. But when you say recreate, I assume that that data
10 exists somewhere that can be retrieved.

11 MR. GROOTHUIS: I think so too. But I'll be --

12 THE COURT: Okay. But recreate suggests something
13 else.

14 MR. GROOTHUIS: I didn't mean to suggest that we
15 were going to --

16 THE COURT: Okay.

17 MR. GROOTHUIS: -- create something new from old
18 thoughts.

19 THE COURT: All right. So those were the two big
20 ticket items so-to-speak in the Lehman motion to compel.
21 Is that anything, Mr. Tambe, that said his -- that's been
22 left by the side of the road?

23 MR. TAMBE: No. Those are the two issues in our
24 motion, Your Honor.

25 THE COURT: All right. So now let's go back the

1 other way. Okay. And talk about what you folks want from
2 Lehman. All right. I will tell you that I believe that
3 that work product privileges is broader than you say. And I
4 believe that there's a difference between a bankruptcy
5 estate and what it does and a financial institution and what
6 it does.

7 There have been other instances in which Lehman
8 has produced narrowly tailored documents that they've
9 convinced me directly relate and are relevant to a dispute.
10 There's no dispute quite like this one. But a dispute like
11 this.

12 And I'm struggling here because as I said an hour
13 ago, at the threshold issues of the set off and the
14 assignment, and then I have the issue of the as soon as
15 practicable. That's the key one here. It's the as soon as
16 practicable. It's not -- we don't even get to the quotes
17 and how the quotes were used and which quotes were used
18 issue yet. We get to what they're saying is that you failed
19 to comply with the requirement that the valuation statements
20 be delivered as soon as reasonably practicable.

21 So any -- there's nothing that I can imagine from
22 Lehman that would bear on that issue. That only has to do
23 with your reasons and the facts and circumstances
24 surrounding your nondelivery of the documents for the period
25 of time. So that's the first problem that I have.

1 So you if you want to speak to that?

2 MR. GROOTHUIS: Yes. Do you want me to speak --
3 do you want me to start there?

4 THE COURT: Sure.

5 MR. GROOTHUIS: Sure. So on the timing of the
6 delivery of the valuation statements, I'm not disagreeing
7 that Moore's particular facts and circumstances are going to
8 be relevant.

9 Our position however is it may also be relevant
10 whether Moore was the first person to submit its valuation
11 statement, the 50th percentile or the very last person. And
12 that has some bearing on whether Moore was acting reasonable
13 when it submitted its valuation.

14 THE COURT: So in other words, if we looked at the
15 entire body of Lehman terminated trades, right. If out of
16 the million of them, 800,000 were submitted in nine months,
17 then that is probative of the fact that your period of time.

18 MR. GROOTHUIS: That's our -- that's our
19 position.

20 THE COURT: Okay. Mr. Tambe, what do you think of
21 that?

22 MR. TAMBE: I think it sort of reads out the
23 relevant language from the operative provisions. It makes
24 it sound like all that the provision required is reasonable
25 conduct. And that's not quite how it reads. So this is Tab

1 5.

2 THE COURT: Okay.

3 MR. TAMBE: And we talked about this in a
4 different context in the last time we were here on Moore.
5 And this is 6D1 from these -- the Master Agreement.

6 THE COURT: Right.

7 MR. TAMBE: It starts with the notion that it's
8 going to be on the early termination date. So it's on or as
9 soon as reasonably practicable following the occurrence of
10 an early termination date. So the default position really is
11 on. And if I'm not on the early termination date, it's kind
12 of up to Moore to say why it was not reasonably practicable
13 for Moore not to deliver on the early termination date.

14 This is not a general search for what are
15 reasonable periods of time to deliver calculation
16 statements. You're supposed to do it on the early
17 termination date. And they control, by the way, what day is
18 the early termination date. It's not automatically
19 determination. They could have waited a couple of days,
20 gotten their ducks in a row if that's what they needed to
21 do, and terminated and given us a calculation statement.

22 That's not what they did. So it goes back to the
23 relevance point. What other parties did, how they were
24 situated, why it may have been reasonable practicable --

25 THE COURT: You see, that gets to the heart of the

1 issue, because -- and I don't -- I don't know if Lehman has
2 this data. But let me try to explain my problem which is
3 that each party has its own set of facts. And what's
4 reasonably practicable for one party may not be for another
5 party. So that somebody who's not as sophisticated as
6 Moore, somebody like, I don't know, a hospital or a public
7 entity that doesn't really understand what's happening and
8 it might take them awhile to get their act together. And
9 there might be a lot of them and Lehman might have a lot of
10 them. But that doesn't mean that, that has a bearing on
11 what's -- what was reasonably practicable for Moore to have
12 done. That's kind of the disconnect that I have.

13 MR. TAMBE: My response to that is that's an
14 argument that Lehman would be free to make if it turns out
15 that there were 200,000 counterparties that submitted their
16 valuation statements after Moore did and they're all
17 different in some way, they can make that argument.

18 But the issue right now is, is it discoverable?
19 Is it at all relevant to party's making for a defense? And
20 they'll be free to make all of those arguments. But we
21 should be free to make our arguments too. And one of the
22 pieces of discovery that we think we need in order to make
23 this argument is where did we fit in line in terms of all
24 the other counterparties. It relates to our claim or
25 defense that we have and that's why we think it's discovery.

1 THE COURT: Mr. Tambe, what kind of data does
2 Lehman have you think that --

3 MR. TAMBE: I know we have some data and I can --
4 if I can (indiscernible) for just a minute or two, I can
5 tell you what would level to the field we have. I'm not sure
6 we're going to advance the ball. I mean for example if we
7 come back and say off a 1,000 counterparties --

8 THE COURT: Right.

9 MR. TAMBE: -- 250 did it within three months, 250
10 took six months, 250 took nine months, then my next question
11 is going to be well, who are the 250 who did it in three
12 months?

13 THE COURT: Right, I mean --

14 MR. TAMBE: Who are the 250 that took nine months?
15 You they go a trial within a trial as to whether they are
16 not liar or an out and out liar. We're not going to argue
17 it. But if it advances the ball, Your Honor, we're not
18 going to argue that they were not reasonably practicable
19 because they were one of the latest parties.

20 We're just simply going to say they standing alone
21 took too long based on their own facts and circumstances,
22 not in comparison to the others, just by themselves.

23 THE COURT: See the problem -- the problem becomes
24 one of once you attempt to put this in that larger context,
25 but there are so many problems with it because it ends up

1 being -- having cherry picking problems, having problems
2 having to do with what else was going on with a particular
3 counterparty. It will never end and I -- I don't believe
4 and I'm going to stick to my original inkling on this one.
5 That I don't believe that it's relevant at all no matter
6 what it said.

7 I don't think it's relevant to the question of
8 whether Moore delivered its calculation statements in a
9 period of time that was reasonably as soon as reasonably
10 practicable for Moore under its circumstances. I do not
11 believe that what other parties did has a bearing on that.
12 So that's going to be my ruling on that one in terms of
13 preserving Moore rights. All right.

14 So do you want to go the next, your next one?

15 MR. GROOTHUIS: Sure. Do you want me to talk
16 about the internal the internal Lehman valuations or the
17 other counterparty evaluations?

18 THE COURT: What -- we have -- whatever you'd
19 like.

20 MR. GROOTHUIS: Okay.

21 THE COURT: Okay.

22 MR. GROOTHUIS: So let's talk about Lehman's
23 internal valuations. What we're asking for is Lehman's
24 unvarnished valuations prepared by the business people that
25 were working for the estate. And we believe that these are

1 valuations that would have been prepared in the ordinary
2 course of the estate's business unwinding the one million or
3 so transactions that refer to in their paper -- in their
4 papers.

5 And that those transactions would have had to have
6 been valued whether there was going to be litigation or not.
7 Lehman's position is that from the moment they filed for
8 bankruptcy, every valuation that was generated by anyone of
9 the estate was done in anticipation of and because of
10 litigation. And in other words, what they're saying, if the
11 purpose of the bankruptcy estate is to litigate. And there
12 isn't a case that supports that sweeping assertion and would
13 upends that (indiscernible) of law. It is not the law that
14 every piece of paper generated by a bankruptcy estate is
15 prepared because of litigation.

16 It's their burden to establish the critics. And
17 so they submitted declarations in support of their assertion
18 that the vast majority of the items on their privilege log
19 are spreadsheets that have some language that say
20 spreadsheets prepared in anticipation of litigation. And
21 these are not just spreadsheets, but regularly prepared,
22 regularly sent to in some cases as many as 300 people.

23 It's their burden to produce evidence that these
24 spreadsheets were prepared in anticipation of litigation,
25 but we've looked at these declarations and what they're

1 saying is that the estate had a six-step process for valuing
2 transactions. And they talk about how they had to collect
3 the data, reconcile trades, and then go through the process
4 of valuing these transactions.

5 Not once in these declarations do they talk about
6 how they're being prepared for litigation which they would
7 be required to do, it's out position, if they were going to
8 assert an attorney work product objection. And because none
9 of these declarations mention the concept of litigation, we
10 don't think they've met their burden that these ordinary
11 core spreadsheets were in fact prepared in anticipation or
12 because of litigation.

13 And the case upon which they are principally
14 relying, this DeAngeles (ph) vs. Poursine (ph) case, we
15 think doesn't support their position because there's a case
16 where counsel permissions and accounting firm -- and this is
17 counsel to a CIPA trustee in the N.F. Wilco (ph) case to
18 investigate the source of missing customer files. It's a
19 sort of forensic examination. That's the kind of thing that
20 is done in -- because of litigation. And that case talks
21 about how litigation was virtually inevitable.

22 Here we're talking about preparing spreadsheets
23 that compare counterparty's valuation to Lehman's own
24 business people's valuations. And so even if at some point
25 I think their claim is that because somewhere among those

1 300 people there was a lawyer and a lawyer may have asked
2 for something, that doesn't imbue all of these documents
3 that are prepared in the ordinary course with the privilege
4 that's generated by an attorney work product requirement.

5 Even their papers talk about the possibility of
6 litigation but that's not enough. It has to be under the
7 second circuit case of U.S. vs. Ottoman (ph).

8 THE COURT: So when do thing work product attaches
9 for the purpose of this dispute?

10 MR. GROOTHUIS: So I haven't obviously seen the
11 documents on their privilege laws. We know that we received
12 -- we first received the subpoena from them in the middle of
13 2014. So we knew they were contemplating litigation in the
14 middle of 2014. Prior to that, I see no suggestion either
15 in the privilege laws or any of the declarations that they
16 presented on this motion that suggests that they were
17 contemplating litigation.

18 And to be clear, I mean they say, well, Lehman was
19 a big bankruptcy. There was lots of counterparties, of
20 course there was going to be litigation.

21 But the standard is not some litigation against
22 some counterparty. Obviously, any large bankruptcy there is
23 a possibility of some bankruptcy. But what they're saying
24 is these documents were prepared in anticipation or because
25 of the litigation against Moore.

1 THE COURT: I've lost the thread of what -- what
2 it is that you want. You want any agreements, valuations of
3 Moore's positions?

4 MR. GROOTHUIS: Yes. That's what we want. And at
5 some point as far as we can tell, it's the middle of 2014
6 when they started actually preparing for litigation against
7 Moore and lawyers were getting involved in that process. I
8 understand there would be an attorney work product privilege
9 at that point. But prior to that point, I want their
10 internal valuations of these trades so that when they
11 challenge the reasonableness of Moore's valuations, I can
12 cross-examine their expert based on Lehman's internal
13 valuations.

14 THE COURT: Bearing in mind that their claim is
15 that you didn't deliver the valuation statements as soon as
16 reasonably practicable.

17 MR. GROOTHUIS: That's one of their claims.

18 THE COURT: Right.

19 MR. GROOTHUIS: But they are also claiming
20 valuation differences. And as I mentioned earlier, the --
21 you know the valuation piece of this case has become the
22 tail wagging the dog. It's a far bigger piece in terms of
23 dollars and cents point of view than the delivery of the
24 valuation statements for the assignment and set off piece.

25 It's, you know, in the order of tens of millions

1 of dollars of claims against Moore specifically related to
2 valuation issues when factoring the interests.

3 And so because of that we believe that we are
4 entitled to Lehman's internal valuations.

5 THE COURT: Right. Mr. Tambe, why don't you
6 respond to that. First of all, how burdensome -- let's hold
7 the date for a moment. How burdensome would it be -- well,
8 doable would it be to identify and produce internal
9 valuations of the Moore trades or the Moore terminations?

10 MR. TAMBE: There would be some burden involved.
11 There are -- there's a type of spreadsheet that would have
12 valuation information on it for Moore and other
13 counterparties. Those spreadsheets can be identified, but
14 then they would need to be redacted for all of the other
15 parties so that only --

16 THE COURT: Okay.

17 MR. TAMBE: -- the line relating to Moore would
18 have to be raised.

19 THE COURT: All right. So let's do them. Let's
20 just do them.

21 MR. TAMBE: Yeah. As long as it's not seen as the
22 broader waiver of work product/privilege, we're happy to
23 produce that.

24 THE COURT: It's not a broader waiver. I'm
25 ordering you to do it. Okay.

1 MR. TAMBE: Okay.

2 THE COURT: Okay?

3 MR. GROOTHUIS: Great.

4 THE COURT: Okay. All right. Are we almost done?

5 MR. GROOTHUIS: Almost done. One more issue, Your
6 Honor.

7 THE COURT: One more. Okay.

8 MR. GROOTHUIS: And that relates to other
9 counterparty valuations --

10 THE COURT: Okay.

11 MR. GROOTHUIS: -- that we haven't received. As
12 to that, I think there are -- they've raised both burdensome
13 and relevance objections.

14 THE COURT: This is where you polled the Citibank
15 card?

16 MR. GROOTHUIS: Well, it's not just Citibank. I
17 mean we've been looking at some of the transcripts from
18 other proceedings (indiscernible) used. We know they
19 produced them in other cases. We were told by Lehman's
20 counsel in this case that the reason they were making this
21 motion to disclose the derivatives questionnaires was so
22 that they could produce these things to us among others.

23 They made the motion. The motion was granted.

24 We're still waiting for these counterparty valuations.

25 There's at least one letter in this record where they say

1 they're going to give it to us in a couple of weeks and here
2 we are. We still haven't gotten them.

3 THE COURT: Okay. So let's here from Mr. Tambe
4 about that -- about this one. Where are we on this one?

5 MR. TAMBE: One point, the motion to disclose the
6 questionnaires by the way was opposed by a number of
7 parties, including Moore. So the very stuff they want --
8 basically no one else should have. But let's not get hung
9 up on that.

10 We're happy to produce to them the questionnaire.
11 I think that the filter is any counterparty that had trades
12 similar to the trades that Moore has, that would be the
13 universe. If that can be readily done, we'll do it that
14 way. Otherwise, if they want several thousand
15 questionnaires, they're happy to have them and they can go
16 through them.

17 MR. TAMBE: Just to respond to the point about our
18 -- we objected on confidentiality grounds. We weren't
19 saying that they shouldn't be turned over. We're just
20 saying that they should be produced in a way that protects
21 the confidential information.

22 THE COURT: Okay. All right. I'll let that one -
23 - I'll let that one pass.

24 MR. TAMBE: I think he may have left that part
25 out.

1 THE COURT: I think you just got -- I think you
2 just got another group of documents though.

3 MR. GROOTHUIS: I'm not sure I did because I've
4 heard this before and I know I'm trying to be respectful,
5 but we've heard this before, that we're going to get this
6 type of information and we're going to look into it.

7 THE COURT: Okay. But Mr. Tambe just told me, and
8 I know where he lives. So he's going to produce those
9 documents to you and then if there's something more -- no
10 pun intended that you think is necessary, you know where I
11 live.

12 MR. GROOTHUIS: Fine.

13 THE COURT: All right. So I think --

14 MR. TAMBE: That will be done, Your Honor.

15 THE COURT: -- that that is it.

16 MR. GROOTHUIS: Okay.

17 THE COURT: All right?

18 MR. TAMBE: Except for the objecting party. The
19 parties who object that we can't share that stuff. But
20 everyone else's. I think there are several thousand still
21 that we can produce.

22 THE COURT: I can't get around that. Right?

23 MR. GROOTHUIS: I don't know if you can or you
24 can't, Your Honor.

25 THE COURT: Not without doing something -- not

1 without doing something else. Why don't we agree that
2 you'll start with what is not problematic and then to the
3 extent that you feel that you need more, again, no pun
4 intended, we can -- it's without prejudice to your rights to
5 continue to press for those other documents subject to
6 whatever else it is that we have to do.

7 MR. GROOTHUIS: Okay. So then just a housekeeping
8 matter.

9 THE COURT: Yes.

10 MR. GROOTHUIS: If that discovery pile I believe
11 is the middle of October. So we're trying to schedule
12 depositions now for September. Can we get a sense for when
13 we're going to get these documents so we have enough time to
14 review them and then just make sure that we --

15 THE COURT: Well, I have to -- when am I going to
16 get your in -- I'm going to get a set of in-cameras, right?

17 MR. TAMBE: Yes.

18 THE COURT: Okay. So you'll get those to me next
19 -- today -- I don't even know what day it is. Today is
20 Wednesday?

21 MR. GROOTHUIS: Wednesday.

22 THE COURT: You'll get them to me sometime next
23 week?

24 MR. TAMBE: By next week, we can do that. Next
25 -- and as soon as they transmit those to you, we'll be

1 delivering to them the questionnaires.

2 THE COURT: Okay.

3 MR. TAMBE: So let's set a date. Monday -- Monday
4 of next week, we can do it.

5 MR. GROOTHUIS: You can do that?

6 THE COURT: Monday, Tuesday, Wednesday. Monday
7 makes people work on the weekend.

8 MR. GROOTHUIS: That's true.

9 THE COURT: And it's the summertime. Okay. So
10 let's not do Monday. All right.

11 MR. GROOTHUIS: Tuesday.

12 THE COURT: Tuesday?

13 MR. GROOTHUIS: Yep.

14 THE COURT: Tuesday?

15 MR. TAMBE: You got it.

16 I've been told that we can't --

17 THE COURT: Ms. Sawyer is trying to tell you
18 something.

19 MS. SAWYER: We can't receive this, not in July.

20 MR. TAMBE: (indiscernible) can be and can't be
21 done be for questioning?

22 THE COURT: When in telling him what to do, you
23 know. Not to let it -- have to let him listen.

24 MR. TAMBE: So, I'm being told --

25 THE COURT: By the people who have to do the work.

1 MR. TAMBE: Who to do the work and let me know
2 whatever date that is. It's at least a week for the
3 questionnaires and the different counterparties gave us a
4 backup information with different formats. I'll just state
5 -- Credit Speaks for example gave us a gigabyte of
6 information for one. So that would be produced as soon as
7 we can produce them. Okay. And I can't tell you --

8 THE COURT: And do you want -- look, if you need
9 relief from the deadline a little bit, we can do that.
10 Without -- you know, without knowing the volume and the
11 exact timing it seems unfair to say right now. But let's
12 just roll it out in good faith to each other and then to the
13 extent that you need relief from the schedule if you can't
14 work it out which I encourage you to do, you'll let me know.
15 But a couple of weeks one way or the other doesn't really
16 make that much difference.

17 MR. GROOTHUIS: And that's fine. I just want to
18 be clear what we're getting. It's -- if the parties
19 submitted both the derivative questionnaire and backup for
20 the actual quotes that they used --

21 THE COURT: Yes.

22 MR. GROOTHUIS: -- that's what we're getting.

23 THE COURT: That's how the derivative
24 questionnaire is defined --

25 MR. GROOTHUIS: Yes.

1 THE COURT: -- it includes the backup, it includes
2 the stuff they submitted.

3 MR. GROOTHUIS: Okay.

4 THE COURT: Right?

5 MR. GROOTHUIS: And I guess we'll be back in touch
6 if the volume is such that we feel like we have to extend
7 the schedule.

8 THE COURT: All right, but, you know, you have to
9 be careful what you ask for sometimes.

10 MR. GROOTHUIS: I understand.

11 THE COURT: All right? All right, thank you very,
12 very much.

13 (A chorus of thank you)

14 THE COURT: Have a lovely evening.

15 (Whereupon these proceedings were concluded at 4:29
16 p.m.)
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I N D E X

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C E R T I F I C A T I O N

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certify that the foregoing transcript is a true and accurate
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